

United States
Circuit Court of Appeals
For the Ninth Circuit.

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

vs.

HENDY REALIZATION CO., a corporation,
(formerly THE JOSHUA HENDY IRON
WORKS,) A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R. BAS-
SICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HYLAND
and MORRIS LEVIT,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 495 to 944

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

No. 10085

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Upon Appeal from the District Court of the United
States for the Northern District of California,
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In the Southern Division of the United States District Court, in and for the Northern District of California.

Before: Hon. A. F. St. Sure, Judge.

No. 25,937-S

In the Matter of THE JOSHUA HENDY IRON WORKS, a corporation,

Debtor

HENDY REALIZATION CO., (Formerly The Joshua Hendy Iron Works) a corporation,
et al,

Petitioners,

vs.

HAROLD M. P. BEHNEMAN and GLADYS M. SHORES,

Respondents.

No. 21,792-S Civil

GLADYS M. SHORES,

Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (formerly The Joshua Hendy Iron Works, A. J. MAYMAN, C. B. MOORES, E. PRICE, A. E. WEBBER, and W. R. BASSICK, individually and as directors of Hendy Realization Co., ELMER M. HYLAND, MORRIS LEVIT, First Doe, Second Doe, and Third Doe,

Defendants.

REPORTER'S TRANSCRIPT
(Before District Judge)

Tuesday September 23, 1941.

Counsel appearing:

For Gladys M. Shores and Harold M. F. Behneman:

Leo Byrne, Esq.,

Paul S. Jordan, Esq., and

John Skinner, Esq.

For Petitioners and Defendants:

Kenneth Ferguson, Esq.,

Burt W. Levit, Esq., and

Gerald S. Levin, Esq. [399]

The Court You may proceed.

Mr. Jordan: May it please the Court: There are two matters before your Honor for trial this morning, previously consolidated. One is the case of Gladys M. Shores v. Hendy Realization Co., formerly The Joshua Hendy Iron Works, A. J. Mayman, C. B. Moores, E. Price, A. E. Webber, and W. R. Bassick, individually and as directors of Hendy Realization Company, 21,792-S in this Court, and the other case is in the old reorganization proceeding which was pending before your Honor some years ago In the Matter of the Joshua Hendy Iron Works, Debtor, No. 25937-S, and then there is the action of Hendy Realization Co., formerly The Joshua Hendy Iron Works, A. J. Mayman, C. B. Moores, E. Price, A. E. Webber, and W. R. Bassick, individually and as directors of Henry Real-

zation Company, Elmer M. Hyland, Morris Levit, referred to as Petitioners. Your Honor will observe that the defendants in the action of Shores v. Hendy Realization Company are the same as are referred to as petitioners in the reorganization matter. The action of Shores v. Hendy Realization Company, which was commenced in the Superior Court of the State of California in and for the City and County of San Francisco on January 17th of this year, is in the nature of a plenary action. The reorganization matter was instituted on February 19th of this year, through the filing of the petition on that date, in which, as I said before, the defendants in the Shores action became the petitioners, and the plaintiff in the Shores action and Dr. Behneman became respondents.

I might say that Mrs. Shores and Dr. Behneman are represented by Mr. Leo Byrne, Mr. John Skinner, and myself, and the defendants in the Shores action, that is, the Hendy Realization Company and the various named individual defendants and petitioners in the [400] reorganization matter are represented by Mr. Kenneth Ferguson, of Pedder & Ferguson, by Mr. Gerald S. Levin, of Pillsbury, Madison & Sutro, and Mr. Bert Levit, of Long & Levit.

I think that the issues involved in this litigation are rather simple, but there is a considerable factual background which I feel your Honor should have, and as to that I would like to make a rather elaborate statement, not only as to the facts——

The Court: Why confuse the issues with your statement?

Mr. Jordan: I will try not to.

The Court: You say the issues are simple, and then you wish to make an elaborate statement. Do not confuse them by an elaborate statement.

Mr. Jordan: I will do my best not to.

The Court: What are the issues?

Mr. Jordan: If I may be permitted to make a preliminary statement of the facts I think the issues will be evident.

The Court: Go ahead.

Mr. Jordan: The evidence will show that The Joshua Hendy Iron Works, now known as the Hendy Realization Company, was incorporated in 1906 as a California corporation, and from that time on up to the end of 1940, November 15 of last year or thereabouts, to be exact, was engaged in the general foundry business and machinery manufacturing business at Sunnyvale, California, where they had a very large plant.

The company got in financial difficulty in the spring of 1932, and went into a state receivership. In July, I believe, of 1935, three creditors of the Joshua Hendy Iron Works filed a petition in this court for reorganization under 77-B of the Bankruptcy Act. Your Honor may recall the matter, because the proceeding was in this court. As a result of that petition, [401] proceedings were had to the end that a plan of reorganization was formulated by the creditors and stockholders, and the matter

was referred to Judge Wyman by your Honor, and he recommended that it be approved, and on March 24, 1936 an order was entered in this court by your Honor approving and confirming the plan, and directing that it be put into effect.

I think it would be appropriate at this time so that your Honor may have the picture as we go along, that I call your attention to two paragraphs of the plan of reorganization which I consider to be vital. I refer you first to paragraph 6-G, on page 7 of the Joshua Hendy plan of reorganization, which reads as follows:

“G. Capital Stock.

“4,425 shares of the capital stock of the debtor corporation are now outstanding, said shares having a book value of \$212,898.51, but no actual value.

“In consideration of the extensions granted by the creditors and of the reduction of their claims in the sum of \$73,853.06, as aforesaid, the stockholders shall appropriately endorse and deliver the stock held by them to the board of directors of the debtor corporation, appointed as hereinafter provided, to be held by said board as follows:

“1. 50 per cent. of the shares so deposited by each stockholder shall be held in trust and voted by said board for a period of 5 years, and thereafter until the extended obligations are fully paid, so as to leave the management

of the debtor corporation during said period in the hands of its creditors. The board shall have power to vote said stock, including the power to vote for a reorganization of the capital structure of the debtor corporation, so as to provide, at any time, for an issue of one [402] or more classes of preferred stock and the exchange therefor of any part or all of the unsecured liabilities of the debtor corporation. Upon the expiration of 5 years and the payment in full of the extended obligations, such shares shall be returned to their respective owners."

Your Honor will observe in that paragraph 6-G that the plan required the old stockholders, that is, those who were stockholders at the time the plan was confirmed, to turn in all their stock to the new Joshua Hendy board of directors, and receive back voting certificates for 50 per cent. of the holdings and the other 50 per cent. was to be held by the directors in accordance with the provisions of the second subdivision of 6-G:

"The remaining 50 per cent. of the shares so delivered by each stockholder shall be held by said board free and clear of any claim, right, title or interest therein by such stockholder, to be distributed by said board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs."

I would like to call your Honor's attention to paragraph 7, on page 8 of the plan, which refers to the method of selecting the new board of directors, which was to administer the plan. There was to be a board of five directors; three of them were to be nominated by the secured creditors, one to be nominated by the unsecured creditors, and one by the old stockholders.

Now, we come to paragraph 8, which is entitled "Effect."

"While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principle and interest on pre-receivership obligations (excepting [403] from proceeds of assets already allocated as security and therefore not available for working capital), for a sufficiently long period to give the new management an opportunity to resuscitate the debtor corporation, while at the same time the rate of interest is materially reduced. The mere deferment of payment does not, of course, satisfy either principle or interest; but it is manifest that the definite postponement of the payment of all interest and pre-receivership liabilities for five years (so that, during such period, the debtor corporation will only be required to pay its current operating expenses, taxes, and the small balance of its receivership accounts), will af-

ford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

Those are the pertinent portions of the plan which I wish to call your Honor’s attention to. In addition, I wish to also point out that the amount of obligations of this company at the time, or just prior to the approval of the plan, totaled—let me state it this way. The total amount owing by The Hendy Company just prior to the adoption of this plan was considerably in excess of \$600,000. I cannot seem to put my finger on the amount at the moment, but I will develop it later. By reason of that plan, that total obligation was reduced so that under the plan the company was to repay \$549,317.04. However, there was no obligation, according to the plan, to repay that until the period of five years had elapsed from the date of the approval; in other words, the company’s obligations were reduced first and then payments deferred for a period of five years; then they [404] matured. Of course, that five-year period would not mature until March 24 of this year.

Now, following the approval of this plan, and your Honor’s order directing that it be put into effect, we will show that the defendants Mayman, Moores,

and Price were almost immediately thereafter, on April 28, 1936, to be exact, elected to the board of directors of this company. They continued to act during 1936 until the annual meeting of stockholders in March of 1937, when they were re-elected, and the defendants A. E. Webber and W. R. Bassick were added to the board, and the evidence will show that the defendants Mayman, Moores, Price, Webber and Bassick continued to act as the directors of this company from March 15, 1937 until March 17, 1941.

In that connection I would like to ask counsel if they would stipulate that the defendant A. E. Webber passed away early this year.

Mr. Ferguson: Yes. There is no pleading on file in his behalf. We have not endeavored to effect a substitution of his personal representative.

Mr. Jordan: The pleading has been withheld pursuant to stipulation because of the fact that counsel were not authorized to appear for anyone.

Mr. Ferguson: That is correct.

Mr. Jordan: In any event, if I am correct, and if I am not you correct me, there was no replacement on the board from the time of his death until the annual meeting held on March 15 of this year.

Mr. Ferguson: That is correct.

Mr. Jordan: We propose to show, your Honor, that on November 4 of 1940 the management of the Joshua Hendy Iron Works had repaid [405] of the \$549,317, that is provided for to be paid under the plan, \$254,238. I am leaving off the cents.

The Court: In 1940?

Mr. Jordan: The total amount to be paid under the plan is \$549,317, and the amount that had been paid up to November 4, 1940 was \$254,238, leaving unpaid at that time \$274,965. Now, we expect the evidence to show without any doubt——

The Court: Nothing has been paid since that date?

Mr. Jordan: It has all been paid since that date.

The Court: It has all been paid?

Mr. Jordan: Yes.

On November 4, 1940, McDonald & Kahn, Inc. made an offer to the Joshua Hendy Iron Works, through the medium of Mr. Moores, one of the directors, to purchase the Sunnyvale Plant. We will show that the Sunnyvale plant and the machinery there, and the materials on hand constituted all of the operating assets of this company at that date. Mr. Moores, on November 4, 1940, presented to the board of directors of this company the proposal of McDonald & Kahn, Inc. that they receive an option to purchase the Sunnyvale plant for the sum of \$426,000, with certain adjustments to be made relative to pending jobs. After discussion at that board meeting a resolution was adopted under which it was determined that the option should be granted at that figure. That option was to expire at noon of November 15, 1940, some eleven days later.

In addition, the option also provided that in the event that it was exercised by McDonald & Kahn,

Inc. that the Joshua Hendy Iron Works would relinquish any further right to the use of the name of The Joshua Hendy Iron Works.

We expect to show on or about November 15, either McDonald & [406] Kahn, Inc., or Felix Kahn, as assignee of McDonald & Kahn, Inc., exercised that option, and within a matter of a very few days thereafter, I believe somewhere around the 19th of November, the full purchase price was paid, subject to later adjustments on current work.

We expect to show that shortly following the consummation of the sale of the plant that all of the then unpaid or remaining unpaid obligations of the company under the plan, as I said before, in the amount of \$274,965, were paid. That left the company with assets consisting of, as I understand it—I do not think we will have any difficulty in getting this, because I presume that counsel will stipulate to a great many of these facts—accounts receivable, cash in bank, unimproved lot in San Francisco, some office furniture here in San Francisco, where the company maintained its administrative office, and if there were any further assets I am not familiar with them. I believe there was a Nash automobile, but, in any event, those were the remaining assets.

The Court: What was the value of the remaining assets?

Mr. Jordan: That is something I will have to develop from the evidence. I am not acquainted with

the amount of the value. I do not believe they have all been liquidated.

On November 15, about the same time that the purchase price was paid for the plant by Mr. Felix Kahn, as assignee of McDonald & Kahn, Inc., the board of directors of the company met and adopted a resolution authorizing the change of the company's name from The Joshua Hendy Iron Works to its present name, Hendy Realization Company, and at a meeting of the stockholders immediately thereafter the stockholders, being also the voting trustees of all the outstanding stock, that change was ratified, and I believe [407] on or about December 2 proceedings necessary to effect that change of name were concluded, so that since December 2 the name has been Hendy Realization Company.

We propose to show that from November 15, 1940, this company has done nothing, practically, in the way of carrying on business other than to effect a liquidation and wind up.

On December 4, 1940, there was another directors meeting, and we propose to show at that particular meeting additional compensation was declared by the board of directors in the total amount of \$102,729.76.

The Court: What was that for?

Mr. Jordan: That is something I cannot answer. It was referred to in the minutes, and in the financial statements that have been issued as additional compensation for 1940. On that occasion Mr. Bassick, the president and manager of the company

received a bonus or additional compensation of \$40,000, Mr. Hyland was voted \$20,000, Mr. Levit was voted \$20,000.

The Court: What was that for?

Mr. Jordan: I will endeavor to develop that during the trial.

The Court: Very well.

Mr. Jordan: I might say at this point, from the time the company came out of 77-B proceedings on March 24, 1936, when your Honor signed the order confirming the plan, up to 1940, in each year, as I recall, bonuses were voted, but the largest amount of bonus in any year during that interim up to 1940 was at this time, and I think the records of the company will so show.

The Court: You say \$102,000 went to the directors?

Mr. Jordan: Only to the extent that Mr. Bassick was a director of the company at that time; Mr. Hyland and Mr. Levit [408] were vice-presidents, but were not directors. Mr. Bassick was a director and also president. In addition to the \$40,000 paid to Mr. Bassick, and \$20,000 each to Mr. Hyland and Mr. Levit, other employees got lesser amounts in the remaining amount of the total of \$102,729.

The Court: That was what date?

Mr. Jordan: December 4, 1940.

Then on December 20, 1940, there was still another board meeting of this company, and the same directors who were still in office, Bassick, Mayman, Moores, Price and Webber, none of them at that

point stockholders of the company, adopted a resolution which provided, in effect stated, that the affairs of this company had been successfully rehabilitated, and then went on to say that, in accordance with the plan of reorganization, the three managing officers, Bassick, Hyland and Levit, were entitled to receive the 2112 $\frac{1}{2}$ shares of stock which had been held by the board of directors, and which had previously been surrendered, as your Honor will recall, at the time the plan of reorganization was approved and confirmed; they voted that Mr. Bassick, Mr. Hyland, and Mr. Levit, by reason of the successful rehabilitation of the company, on December 20, were entitled to receive distribution of 2212 $\frac{1}{2}$ shares of stock held by the directors in trust up to that time.

I may also say that we will show that on that date, on December 20, 1940, there were only 4120 $\frac{1}{4}$ shares outstanding as against 4425 at the time that the plan was confirmed. The reason for that was that the company, sometime in the spring of 1940, had effected a compromise with Mrs. Albertie M. Hendy, one of the old stockholders, whereby her stock had been surrendered to the corporation in extinguishment of an obligation that she owed, [409] amounting to some \$3000, or thereabouts. So that on December 20, the old stockholders held a beneficial interest in 1907 $\frac{3}{4}$ shares, whereas by reason of the distribution to which I have just referred, Mr. Bassick, Mr. Hyland, and Mr. Levit were then owners of 2212 $\frac{1}{2}$ shares of the company stock—in the hands

of Mr. Bassick, Mr. Hyland, and Mr. Levit on December 20, 1940, as against $1907\frac{3}{4}$ shares remaining outstanding in the hands of the old stockholders. That is to say, they held voting trust certificates for the number of shares, with the voting right reserved to themselves, that were still in the hands of the board as voting trustees under the plan.

Then we propose to show immediately following the adjournment of this directors meeting on December 20, that a stockholders meeting was held, at which all of the voting power represented by the outstanding stock was present, namely, the same number of directors as voting trustees, and Mr. Bassick, Mr. Hyland, and Mr. Levit, who had just received their $2212\frac{1}{2}$ shares, proceeded to adopt at that stockholders meeting—and I might say, of course, there were no stockholders present—they adopted a resolution which ratified and approved all of the acts and proceedings of the board of directors upon the date of the last previous annual meeting of stockholders, which was held on March 18, 1940.

On the same day, I believe it was, there was a first liquidating dividend declared of \$45 a share in favor of the $1907\frac{3}{4}$ shares then outstanding in the hands of the old stockholders, but Mr. Bassick, Mr. Hyland, and Mr. Levit were specifically excluded from participating in that first distribution; and that dividend was subsequently paid on all of those shares to the old stockholders, totaling \$85,848.75.

The Court: Give me that date again.

Mr. Jordan: That was on December 20, your Honor.

The Court: The dividends were how much?

Mr. Jordan: The total amount of dividends was \$85,848.75.

The Court: That is to the old stockholders?

Mr. Jordan: That is to the old stockholders holding the beneficial interest at that time in 1907³/₄ shares.

We expect to show that the following day, I believe it was the following day, but anyway the records will substantiate it, another stockholders meeting was held at which it was determined that the affairs of the Hendy Company be wound up and dissolved, and proceedings were then immediately thereafter instituted in that direction and are at the present time pending.

In the meantime, on November 23, I think the date was, 1940, and prior to December 20, when this stock was distributed, on behalf of Dr. Behneman, I wrote a letter addressed to the Board of Directors of The Joshua Hendy Iron Works, at their office in San Francisco, and that letter, in fact, stated that it was Dr. Behneman's understanding that there was to be some distribution of 2212¹/₂ shares of stock; that upon the facts as we knew them, that successful rehabilitation within the meaning and intent of the plan of reorganization, and putting the company out of business as a going concern, those facts would not justify the conclusion of a successful rehabili-

tation, and asked that Dr. Behneman and ourselves be advised prior to the taking of any action by the board for distribution of that stock, so that Dr. Behneman could take such steps as he might see fit to protect his rights. We received no reply to that letter, and notwithstanding it the distribution took place.

On March 17, 1941, which is the date, which is the annual [411] stockholders meeting date, a new board of directors was elected, consisting of Mr. Charles R. Gardner, Mr. Stanley Pedder, one of the attorneys for the company, Mr. Hyland, Mr. Levit and Mr. Moores, and they constitute the board of directors of the company at the present time.

It is our understanding, and we propose to show your Honor that it is the intention of the present board of directors, or was the intention of the board which succeeded last March, as soon as the assets of the company had been finally turned into money to pay further liquidating dividends straight across the board, not only on the 1907 $\frac{3}{4}$ shares in the hands of the old stockholders, but likewise on the 2212 $\frac{1}{2}$ shares in the hands of Mr. Bassick, Mr. Hyland, and Mr. Levit. The Shores action is in the nature of a declaratory relief action, and the real gist of the matter is to obtain a judicial determination of whether or not the distribution of this stock by the Hendy board, and I refer to the 2212 $\frac{1}{2}$ shares distributed on December 20, 1940, was illegal. Of course, that question hinges upon the further fundamental question of whether or not the affairs

of the Hendy Company had become successfully rehabilitated on December 20, when the distribution was voted.

The Court: When you say "distribution," you mean the distribution of 2212½ shares?

Mr. Jordan: Yes, that is correct. We are seeking to have that distribution, under the facts as I have related them to your Honor, declared illegal, and that the defendants Hyland, Levit, and Bassick be required to surrender back that stock, in order that it may be canceled or returned to the original stockholders, as your Honor may direct, and that any further liquidating dividends be paid only on 1907¾ shares of stock presently [412] outstanding in the hands of the old stockholders.

The Court: Where is that language "successful rehabilitation" used in the plan?

Mr. Jordan: Paragraph 6-G 2.

The Court: That is what you read to me?

Mr. Jordan: I read that to your Honor a little earlier, on page 7 of the plan, paragraph 6-G 2.

We are also going to show your Honor that between March 24, 1936, when your Honor approved this plan of reorganization, up to December 31, 1940, Mr. Bassick, Mr. Hyland, and Mr. Levit, inclusive of salaries, received during that period a bonus—received, respectively, the following amounts: Mr. Bassick \$83,101.82; Mr. Hyland \$46,216.57; Mr. Levit \$45,517.50. And, in addition, Mr. Bassick, at the end of last year, was voted a Nash automobile which belonged to the company.

Now, further, very briefly, on the question of the history of this litigation, the Shores action was removed to this court by petition, and your Honor may recall that I made a motion to remand, and that motion was denied by your Honor upon February 17. This petition was filed under the old reorganization proceeding.

The Court: By your clients?

Mr. Jordan: No, the petition in the reorganization proceeding was filed by the very individuals who were defendants in the Shores action, in other words the Hendy Realization Company, Mayman, Moores, Price, Bassick, Hyland and Levit, all defendants in the plenary action of Shores v. Hendy Realization Company, et al., became the petitioners in the reorganization matter, their petition being filed in this court on February 19, of this year, at which time there were pending not only the Shores action, but [413] also in the State court a similar action of Behneman v. Hendy Realization Company, et al.

The Court: What is the suit of Hendy Realization Company v. Behneman and Shores.

Mr. Jordan: The purpose of it, that is the only relief sought is to permanently enjoin further prosecution of the action which was never removed from the State Court to this court.

The Court: That suit was never removed?

Mr. Jordan: It was never removed, it is still pending there. Upon the filing of that February

19th petition, and upon the filing of a subsequent petition a few days later, your Honor issued an order to show cause returnable before Judge Wyman, and also a temporary restraining order restraining the prosecution of the Behneman action and the Shores action, and also an action under Section 403 of the Civil Code now pending in the State Court, in which Dr. Behneman, as petitioner, sought to have the court assume jurisdiction over and supervision of the winding up of the affairs of the company. The matter was heard before Judge Wyman on reference by your Honor. We had made a motion to dismiss the February 19th petition on the ground that it failed to state a claim against respondents upon which relief could be granted, the only purpose being to stay litigation and prevent us from going forward, and on the further ground that this court had no jurisdiction over the subject-matter referred to in that petition.

Our basis for that contention was this, that on January 27, 1937, your Honor entered a final decree in the matter of The Joshua Hendy Iron Works, in the 77-B proceeding, and paragraph 16 of that final decree, which I take it is a matter of record in this proceeding, inasmuch as we are presumably in that [414] proceeding, read—and I am quoting:

“That the proceedings for the corporate reorganization of the debtor in this court entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor, No. 25937-S,’

be, and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipts showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization.”

Judge Wyman denied our motion to dismiss and held in fact that this Court did have jurisdiction in the matter under 77-B proceedings, and rendered a report to your Honor, to which we filed an objection. This objection came on for hearing on the same day that the defendant's motion to dismiss the Shores action came on. The result was your Honor denied the motion to dismiss the Shores action and ordered the consolidation of the two matters for trial on this date.

I think now I have covered the matter.

The Court: I suppose you might renew your motion.

Mr. Jordan: I would like at this time, your Honor, for the purpose of the record, to renew our motion to dismiss the petition filed in the reorganization proceeding on February 19, 1941, upon the grounds, your Honor, that the petition fails to state a claim upon which relief can be granted; secondly, that this court lacks jurisdiction over the subject-matter referred to in the petition. I should also

like to renew our written objections to Judge Wyman's Report, which is also undetermined at this point, upon all of the grounds referred to in those written objections which are now on file. Both these motions are made [415] pursuant to rule 12 (b) of the Rules of Civil Procedure of this Court.

I assume that counsel for the defendants and petitioners will want to make a statement to your Honor, and then we can proceed with the evidence.

Mr. Ferguson: If your Honor please, with respect to this matter of jurisdiction, I may point out that this court has, in connection with the Shores action, found that this court has jurisdiction over this type of proceeding, and that the only thing left involved in Mr. Jordan's motion to dismiss is whether or not the court had any power to exercise that jurisdiction also in the 77-B proceeding, and upon that Judge Wyman has reported fully.

Now, your Honor, not to cover any of the ground Mr. Jordan covered in so far as general outline is concerned, I think it might be helpful to point out several things, more in anticipation. In 1936, when this company was reorganized, this company expressly was found to be and admitted to be by the same attorneys that represented Dr. Behneman then to be insolvent, and the court expressly found that it was insolvent; Judge Wyman's report showed it was insolvent, and showed that the stock that is involved was absolutely worthless. At that time

the same attorneys, on behalf of Dr. Behneman, and I might point out Mrs. Shores' counsel in open court objected to, and the same attorneys urged, that the Court had no power to authorize the taking away of 50 per cent of their stock for the purpose it was taken away in the plan.

Judge Wyman's report showed, after long hearings, that the stock was absolutely worthless. The plan provided, as was pointed out, that only 50 per cent of the stock was to be retained by the stockholders, and the other 50 per cent of the [416] stock was to be taken over free and clear of any claim by them; all of the stock was to be held by the voting trustees, and 50% taken from them was to be issued in the discretion of the board of directors, either in whole or in part, to the managing officers as a reward for management, and the successful rehabilitation of the company's affairs. That stock was distributed, but counsel is wrong when he says that the stock was distributed to the directors, not representatives of the stockholders. The stock was not distributed except in one case to any of the directors, and that was Mr. Bassick, president of the company, and he did not participate in any of the voting on the distribution. Two of them represented bank holdings, which were the second largest stockholders, so, therefore, it was very much against their interest to have distributed this stock, and to distribute the bonus, if the plan had been otherwise.

Now counsel referred to the fact that the net

worth was scaled down substantially. As a matter of fact, it was only scaled down some \$15,000, even after reorganization, and after they had all of the scaling down, this corporation still had a net worth of \$61,000. The board of directors and the management, in the intervening time, and up to the time of the distribution of the stock, as will be shown by the records, built the net worth up to something like \$300,000 from \$61,000.

It is significant that Mr. Jordan keeps repeating the words "successful rehabilitation of the company's affairs". The plan says that the stock is to be distributed, that is, 50% of the stock here involved, by the board in its discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company's affairs. [417]

Mr. Jordan's contention is that there must have been a successful rehabilitation before this stock could be distributed. We do not concede that. But assuming for the moment that his contention be correct, that there must have been a successful rehabilitation of the company's affairs before the stock could be distributed, the fact is that the evidence will show that this company was rehabilitated for some years prior to the time that the stock was rehabilitated.

The definition of "rehabilitation," if your Honor please, is not open to speculation. There are abundant cases under Section 75 of the Bankruptcy Act which hold that "rehabilitation" is a word of little

variety of meaning; that it means that you put it back into a solvent corporation, build it back as a going concern; give it some real worth; that is what "rehabilitation" means. It does not mean that you pay off all of its debts 100 per cent. As I say, the company has for more than two years been rehabilitated, that is, for more than two years prior to the distribution this company had a very real, substantial net worth, and under the decisions of the company was rehabilitated.

This, of course, counsel says, under his theory, is a question to be determined, but this determination, if your Honor please, is only incidentally one of law, because the legal definition of "rehabilitation" is, as I say, of little variety. There is no doubt in our mind the court should apply the law rule.

The primary question whether this company has been rehabilitated, or not, under his theory, is a question purely and simply of fact, as to the extent it acquired net worth and to what extent it was solvent.

Now, the directors, by their resolving a distribution of [418] the bonus in stock did determine the question. They, of course, are the persons most familiar with that question of fact. I presume that the court will follow the general rule so far as the question of fact is concerned, that it will not substitute its own judgment for that of the directors, because there is no charge here that they did not exercise it bona fide. There is no question of fraud

or anything of that sort. However, if the Court is not content to follow that rule, but does desire to delve into it, it is simply and purely a question of accounting which we are prepared to prove, that this company actually was rehabilitated; but we cannot do that by just looking at some single set of figures.

I want to point out that although I think Mr. Jordan's statement was in substance correct, I wish to refer to some figures, because they are not correct. He has made the error of referring to some figures taken from the plan, where, unfortunately, owing to the fact that there were some entries before the plan was finally confirmed, so that the figures were colored by the additional entries before the plan could be confirmed. But it is a question whether the company has been rehabilitated or not, whether it has become solvent, whether it has acquired a net worth, as a fact; that is simply a question of accounting, how much net worth did this corporation acquire, what did they do with the physical assets, did they put money in? We will show that not only did the net worth increase from \$61,000 to something over \$300,000, but there was money put back into the plant, both by way of capital assets and by way of operating expenses. This company lost during the two years prior to Mr. Bassick coming in \$183,000. That is the type of corporation that this management took over. [419]

Now, in our opinion, even under his own theory, that there must have been successful rehabilitation,

the question is, Was there a successful rehabilitation of this company, and had it been rehabilitated more than two years; and the proof of that is purely and simply a matter of accounting.

Counsel says there is no element of accounting involved, and yet he wholly ignores his complaint in the Shores case. In that case he prays for a complete accounting of all the stock that was distributed and any dividends, and anything of that sort. In our opinion that answers counsel's contention, because that is his theory of the case. But there is still an entirely separate ground, and that is this, counsel has wholly ignored these words as to how this stock could be distributed, and that is, "As a reward for management."

Now, the words "for management" must be viewed in the light of the plan, itself, of the capacity of these skilled men. The language must be interpreted in the light of the plan, itself, in the light of the proceedings that were had. The words "for management" in there mean just as much as "successful rehabilitation of the company's affairs," and we submit the court must give the effect to those words, which was plainly the intent of the plan, that the stock should be distributed as a reward for management; and this intention is manifested by many facts.

The evidence will show that all of these officers who were ultimately rewarded, immediately following reorganization proceedings, agreed with the creditors of the company to work for less than the

value of their services, under the understanding that they would eventually receive cash and stock to make up the difference in value.

We will show that the same officers who continued after re- [420] organization received substantially less than they received immediately prior.

We will show that all of the officers received a lesser wage than they had been receiving prior to the time of the reorganization, and that, of course, shows an express understanding that they would get stock for management.

I point out that in objecting to this plan of reorganization counsel contends that this language, here, constituted no restriction on the directors and they could give the stock away at any time they chose, in their discretion, and that was never contemplated in the reorganization proceeding, that it was not the intent that this stock should be distributed in the discretion of the board of directors.

Now, turning to the plan, itself, it says—counsel read all of paragraph 8 of the plan. Reading all that paragraph at length might not bring out the fact. Paragraph 8 says:

“While this plan of reorganization will not expunge any of the liabilities of the debtor corporation by transferring them into capital, it will definitely postpone the payment of both principal and interest on pre-receivership obligations (excepting from proceeds of assets

already allocated as security and therefore not available for working capital).”

You will notice that that resuscitation of the debtor corporation is to occur before anything has been paid on pre-receivership obligations—the whole reorganization indebtedness is outstanding.

To continue:

“The mere deferment of payment does not, of course, satisfy either principal or interest; but it is manifest that the definite postponement of the payment of all interest and pre-receiver- [421] ship liabilities for five years will afford the new management a reasonable opportunity for rehabilitation. If the affairs of the debtor corporation cannot be restored within this period, drastic measures, perhaps even abandonment, will be necessary. If, however, substantial progress is made, any necessary further funding should be readily accomplished.”

In other words, by the express terms of the plan it is clear that this stock could be distributed before there had been any payment at all upon the receivership obligations, that rehabilitation would occur even before any rehabilitation proceedings had been paid.

Now, one other consideration. Under the plan of reorganization the stockholders were given only 50 per cent. of their holdings of stock, and the other

50 per cent. of the stock was given to other persons. The distribution is not here involved, and this case does not affect the 50 per cent. distribution which went to the stockholders. There at all times has been 50 per cent. outstanding for the old stockholders and 50 per cent. delivered by the stockholders to be distributed as a reward for management and successful rehabilitation. The distribution now that they complain of does not affect the amount they would receive. What they are trying to do here is to have the 50 per cent. canceled that were surrendered at the time the plan of reorganization was approved, so that their holding now of 50 per cent. again becomes 100 per cent. In other words, they are trying to expressly avoid a provision of the plan of reorganization. At the time the plan was made it was provided they should only have 50 per cent. interest in this company; the company was insolvent; that was a gift to them. The other 50 per cent. was put in to be distributed as a reward for management and the suc- [422] cessful rehabilitation. Whether or not the distribution to the management be correct or not, it could not affect these people one iota. What they want to do is have the stock of these people cancelled, the people that got it as a reward for their services; those people worked for much less than they had received before, and they expressly worked knowing that they were going to get this stock. Now, they want to have that cancelled so that the 50 per cent. which

they have always had will amount to 100 per cent. That, we submit to the Court, is grossly inequitable.

With respect to whether or not this is an accounting matter, we do not want to misrepresent matters to the Court, at all. The legal question, we submit, is of minor importance here. We submit that the court's determination, even under their theory, involves an accounting of the corporation's affairs, and in arriving at that a comparative examination of the affairs of the corporation from year to year must be had, and certainly in the last analysis an examination of the affairs of the corporation as they existed at the time of the plan of reorganization went into effect, and as it was at the time the distribution was made.

Counsel referred to cash distribution, in addition to a stock distribution, pointing out to the Court that that cash distribution, in effect, although not so stated, constituted a first liquidating dividend on the stock, because when the stock was distributed to the management, the management expressly was excluded from participating in these dividends. The old stockholders had been declared dividends of \$45 a share on the stock, and those dividends were due to the efforts of the management. [423]

Now, the cash distribution is not here involved. The only thing involved is the stock.

These same counsel and these same parties have filed another action in the State Court involving the cash distribution, so it is not here before your

Honor. We think they all should be here, but it was recently filed, it is not at issue. That question might be determined here, but the fact is that cash distribution is not here involved. The sole question is the distribution of that stock.

If the Court wishes to proceed, that is entirely satisfactory to us.

The Court: I was wondering how far we could proceed.

Mr. Ferguson: We are prepared to proceed. We have had audits made, and we are prepared to go fully into the question of fact covering appreciation of net worth and rehabilitation as a going concern. That is the question that has to be determined, if Mr. Jordan is correct, whether or not there was a rehabilitation.

The Court: Mr. Jordan, I think you are wasting my time. This is an accounting matter.

Mr. Jordan: I did not expect we were going to argue the matter.

The Court: I know, but what are you going to put in as proof now? You are going to put in certain proof, and the other parties will put in the books. I do not want to go any further with this matter if it be an accounting.

Mr. Jordan: I will tell your Honor exactly what I propose to put in the record in the way of evidence on this matter of the company's financial condition. In my mind there seems to be a very great desire on the part of counsel to get this case

out [424] of this court, get it referred to a master. They have got the table full of books, there, which I do not propose to refer to. The theory of my case is, here we have a plan of reorganization which reduced the amount of this company's obligations, and says in effect you do not have to pay them for five years period of time. The purpose was not to liquidate, but to resuscitate, and if possible to return the corporation in good condition back to the stockholders.

This company goes along for four and a half years; in other words, from March 24, 1936 until November 15, 1940. They have only a matter of four or five months to go until that five-year period expires, when they will have to meet all the unpaid obligations of the debtor under the plan. During that period, and up to November 15, 1940, out of \$549,000 that was deferred on this plan, they had paid less than 50 per cent., they still had that remaining amount to raise, because it was all going to mature in a matter of four or five months. I do not think there is any question of doubt but what the court considered when this plan was approved and the stockholders considered, and the creditors considered that if at all possible they would have this business as a going concern; instead of doing that, on November 15 they sold their plant, and the only resuscitation was the sale.

The Court: From your statement, it would be possible for you to stipulate as to the facts in this case, would it not?

Mr. Jordan: I think that we can stipulate to a great proportion of the facts that I want to put in. Going back to the question of accounting, I am going to put on one expert.

The Court: I am not going to take any accounting, I tell you that before we take any evidence here. [425]

Mr. Jordan: All that I want the accountant that I am going to call to do is—I do not want him to go through these books—is to analyze the statements of this company from 1936 to 1940; he has made an analysis of those statements and what I want to do is to get up on the stand and tell your Honor, as far as the company's condition is concerned in March, 1936—it is all right here in the plan of reorganization; there cannot be any question about it. It shows that concern had a certain amount of money. I am going to put that accountant on the stand and, using their own figures, have him to state to your Honor whether they were making money in 1936, from March to the end of the year, whether they made any money in 1937, 1938, 1939 and 1940, and I am going to practically limit the testimony to giving you this conclusion without any premise. I think that is all your Honor is interested in knowing. You know what the deficit was at the time the plan was approved, and you are going to be told what the deficit was by their own books at the time that they sold that plant. As a matter of fact, I am going to prove to you through

this witness that whereas they made an operating profit of somewhere around \$20,000 in 1940, when they declared this \$103,000 bonus, they wound up with a loss for 1940 of about \$79,000. That is not successful rehabilitation, your Honor.

The Court: Mr. Jordan, I shall permit you to proceed because of the statement you have made, but I want you to understand if I think it is necessary to refer this matter for an accounting I am going to do it. I do not think that you are going to have such smooth sailing as you think. Unless they stipulate the facts with you, the facts can only come from the books, themselves. [426]

Mr. Jordan: That is not the way as we see it.

The Court: All right, go ahead.

Mr. Jordan: First, your Honor, I would like to introduce in evidence as Exhibit No. 1 of Plaintiff Shores and Respondents Shores and Behneman, a copy of the plan of reorganization of The Joshua Hendy Iron Works.

Mr. Ferguson: No objection.

The Court: It may be admitted and marked.

(The document was marked "Plaintiff's Exhibit 1.")

Mr. Jordan: Your Honor, I would like to summarize this portion of the pleading, because we can get this out of the way. I told you what we expected to show, a substantial portion of it.

In the first place, and counsel should follow me on this, paragraph 1 of the Shores Complaint refers to the corporate entity of The Hendy Company,

and to the change of name from The Joshua Hendy Iron Works to the Hendry Realization Company on December 2, 1940. Will it be stipulated the change of name was on that date?

Mr. Ferguson: Yes.

Mr. Jordan: It is stipulated that the name of the corporation was changed on December 2, 1940, from The Joshua Hendy Iron Works to Hendy Realization Company.

Paragraph 6 of the Shores complaint refers to the institution of the involuntary proceedings against The Hendy Company for the corporate reorganization under Section 77 of the Bankruptcy Act, that is admitted.

Paragraph 7 refers to the filing of the proposed plan of reorganization under Section 77-B of the Bankruptcy Act and to the approval and confirmation of that plan by your Honor on March 24, 1936, as well as to the court's direction that the plan be [427] carried into effect.

Paragraph 8——

The Court: That is not admitted.

Mr. Jordan: That is admitted. Paragraph 8 refers to the number of outstanding shares of capital stock as of March 24, 1936, the date of the confirmation of the plan, to be 4425 shares, and that the outstanding indebtedness of the Hendy Company prior to the confirmation of the plan was \$623,170.14; that is, that was the amount of indebtedness on July 31, 1935, and that is the amount referred to in

the statement appended to the plan. That indebtedness was reduced under the terms of the plan by 10 per cent. to \$549,317.04. It is also alleged in that paragraph that the payment of that reduced amount was extended for a period of five years. That also, I believe, is admitted by the pleading.

Mr. Ferguson: I find upon a report here in July, 1935, covering the total amount of indtebedness at March 24, 1936, at the time the plan was approved, \$644,732.27.

Mr. Jordan: What is that?

Mr. Ferguson: That is the amount of obligations.

Mr. Jordan: That was scaled down, but before scaling the amount of obligations——

Mr. Ferguson: That was on March 24, 1936, the date the plan was confirmed, immediately prior to confirmation.

Mr. Jordan: By reason of the scaling of it the plan confirmed that the amount of \$549,317.04 would be the amount paid to the creditors.

Mr. Ferguson: No. The reason for this difference is this, that these figures Mr. Jordan has are figures as of July, 1935, but the plan was not confirmed until nine months later; in the [428] meantime there was a lot of interest accrued and the balance taken on March 24th was \$559,969.72.

The Court: Are the statements made by you and by Mr. Ferguson admitted as facts?

Mr. Jordan: If Mr. Ferguson tells me that those are the figures I am willing to accept them.

Mr. Ferguson: That is what the books show.

Mr. Jordan: Will you repeat them again for the record? Those figures which you are about to give, as I understand it, will constitute, first of all, the amount of the original obligations of the company as of March 24, 1936, immediately before the plan was confirmed, and then the amount that was to be paid under the plan as reduced immediately upon confirmation.

Mr. Ferguson: The receivership obligations before the plan was confirmed on March 24, 1936, the total of principal and interest was \$644,732.27. The balance after reduction was \$568,606.82, plus income tax not contemplated by the plan, of \$1362.90, making a total balance of principal and interest after reduction of \$569,969.72.

Mr. Jordan: That will be stipulated.

Paragraph 9 sets forth in full paragraph 6G of the plan of reorganization which I read to your Honor, and that, of course, is admitted, as well as paragraph 10, which sets forth in full paragraph 8 of the plan under the heading of "Effect."

Paragraph 13 refers to the granting of an option for the sale of the Sunnyvale plant on November 4, 1940, and exercising of the option on November 15, 1940, and to subsequent confirmation of the sale for, as alleged, over \$400,000. The actual amount I believe is stipulated as \$426,000, with adjustments depending upon current work. [429]

Mr. Ferguson: Yes, the amount was \$426,000.

However, as you pointed out, there was a substantial adjustment.

Mr. Jordan: That paragraph also refers to the incorporation of The Hendy Company in 1906, and to its engaging in the general foundry and metal products manufacturing business at Sunnyvale, and to the discontinuance of further business by reason of the sale of the plant and all operating equipment at Sunnyvale. Those facts are all admitted, are they not?

Mr. Ferguson: Yes.

Mr. Jordan: And will be stipulated?

Mr. Ferguson: Yes.

Mr. Jordan: I think the only difference is that the sale was actually consummated or made to Felix Kahn, as assignee for McDonald & Kahn, Inc.

Mr. Ferguson: That is right, he exercised the option.

Mr. Jordan: Now, we filed an answer. Those are the admitted facts under the Shores complaint. We filed an answer and counter-claim to the petition in the reorganization matter, and in that counter-claim there are three or four additional issues raised. The election of a new Hendy board of directors on March 15, 1941—your Honor will bear in mind that the old board was still in office at the time that the Shores action was filed. Will it be stipulated, gentlemen, that on the date of March 17, 1941 Mr. Charles R. Gardner, Mr. Stanley Peder, Mr. Levit, Mr. Hyland and Mr. Moores were

elected as directors of the Hendy Realization Company?

Mr. Ferguson: Yes.

The Court: What paragraph is that of the counter-claim?

Mr. Jordan: That allegation as to the election of the new board of directors on March 17 of this year, your Honor, which [430] has just been stipulated to, appears in paragraph 9 of the counter-claim of respondents Behneman and Shores. I might add that is only a portion of the allegation of that paragraph but other matters have already been covered. I am trying to locate the allegation as to the date of the entry of the final decree.

The Court: Do you know what that was, Mr. Ferguson?

Mr. Ferguson: Yes, your Honor, January 27, 1937.

Mr. Jordan: That will be stipulated, will it?

The Court: What is the date?

Mr. Jordan: January 27, 1937. Incidentally, Mr. Ferguson, will it be stipulated that paragraph 16 of the final decree in the reorganization matter read as I have quoted it to the Court in my opening statement?

Mr. Ferguson: I have a copy of the final decree and you can put it in if you wish.

The Court: The Clerk has handed me the final decree. It was filed on January 27, 1937.

Mr. Jordan: Will it be so stipulated, that the final decree was entered on January 27, 1937?

Mr. Ferguson: I thought I had so stipulated.

The Court: Is there something else in that decree besides that—it reads: “That the proceedings for the corporate reorganization of the debtor in this court entitled ‘In the Matter of The Joshua Hendy Iron Works, a corporation, Debtor, No. 25,937-S,’ be and the same hereby are, terminated and closed; such termination and closing to be for all purposes final upon the filing herein of receipt showing the payment of the final fees and expenses hereinabove allowed, and the surrender and exchange of the stock certificates which have not yet been surrendered and exchanged as provided in said plan of reorganization.” [431]

Mr. Jordan: Will it be stipulated that paragraph 16 of the final decree in the reorganization matter read as just read by the court?

Mr. Ferguson: Oh, yes, certainly, so stipulated. I will not stipulate to its legal effect, of course.

Mr. Jordan: Now, the next matter raised by the counter-claim of respondents Behneman and Shores in the reorganization matter is the allegation referring to the communication to the board of directors on November 23, 1940. I wrote the letter on behalf of Dr. Behneman, questioning the right of the board to distribute the 2212½ shares of stock to Mr. Bassick, Mr. Hyland, and Mr. Levit upon the ground that, under the circumstances which developed up to that time, successful rehabilitation under the plan has not been accomplished. The re-

ceipt of that communication is admitted. That is correct, is it not, Mr. Ferguson?

Mr. Ferguson: I think so. I cannot say exactly. It was about the time the letter is dated.

Mr. Jordan: And finally, there is an allegation in the same counterclaim to the effect that the authorization of this Court to distribute that stock to Mr. Bassick, Mr. Hyland, and Mr. Levit was not obtained by the board of directors prior to the distribution, and that is also admitted.

Mr. Ferguson: That is no special authorization, that is what you mean; in other words, no special order?

Mr. Jordan: No application was made for an order of the court preliminarily to the distribution of 2212½ shares.

Mr. Ferguson: Yes.

Mr. Jordan: Will it be stipulated, Mr. Ferguson—by the way, Mr. Ferguson, you, and Mr. Levin and Mr. Levit, are not [432] appearing separately or individually?

Mr. Levit: We are representing all of the defendants. Mr. Ferguson has the handling oar.

Mr. Jordan: As to the facts stipulated and now admitted, they will be joined in by both of you?

Mr. Levin: Correct.

Mr. Levit: Correct.

Mr. Jordan: Mr. Ferguson, will you stipulate that on March 24, 1936 there were 4425 shares of capital stock of The Joshua Hendy Iron Works outstanding, and referred to in the plan?

Mr. Ferguson: With this qualification, I believe there were 900 shares of preferred stock; that 900 shares was subsequently retired; outstanding and beneficially held there were 4425 shares.

Mr. Jordan: That so appears in the plan of reorganization at the beginning of paragraph 6-G.

Mr. Ferguson: Yes.

Mr. Jordan: On that date, March 24, 1936 plaintiff and respondent Gladys Shores owned 607 shares of the outstanding shares, did she not?

Mr. Ferguson: Subject to this qualification, during the time of this 77-B proceeding there was a trustee appointed, and there were no corporation officers so as to enable a transfer of that stock, and although we understand that she owned it during that time, it actually was not transferred to her, and I cannot give you a stipulation to that effect, but I am perfectly willing to stipulate what her present ownership is.

Mr. Jordan: It is a fact, is it not, that pursuant to the plan of reorganization on the date, which I do not believe is particularly material, suffice to say it was between March 24, 1936 and November 15, 1940 Mrs. Gladys M. Shores surrendered [433] to the proper transfer officer of the Hendy Company 600 shares of stock to the company and received back trustees' certificates for 3031½ shares.

Mr. Ferguson: That is correct.

Mr. Jordan: And the other 3031½ shares representing that holding were thereafter, from the date

of their surrender, held by the board of directors as voting trustees under the plan?

Mr. Ferguson: Until its distribution.

Mr. Jordan: On December 20, 1940. Will you make the same stipulation with respect to Dr. Behneman, that is to say, that prior to the surrender of his shares to the board of directors subsequent to March 24, 1936 and prior to November 15, 1940, he owned $1244\frac{1}{2}$ shares of Hendy stock.

Mr. Ferguson: I will so stipulate, but he did not surrender his shares, he refused to surrender his shares until 1940, I believe. And the record that he received in return half that amount would indicate that he surrendered $1244\frac{1}{2}$ shares.

Mr. Jordan: No point will be raised that in the spring of 1940 he received $622\frac{1}{4}$ shares?

Mr. Ferguson: That is right, I can stipulate to that.

Mr. Jordan: He presently stands of record on the books of the company as the owner of $622\frac{1}{4}$ shares.

Mr. Ferguson: Yes. Perhaps we can stipulate this way.

Mr. Jordan: Are those figures so stipulated?

Mr. Ferguson: You have them right there, Gladys M. Shores is the holder of certificate 194, $303\frac{1}{2}$ shares, and Harold M. F. Behneman is the holder of certificate 186 for 470 shares, and certificate 187 for $152\frac{1}{4}$ shares, which is $622\frac{1}{4}$ shares.

Mr. Jordan: Those respective holdings of Mrs. Shores and Dr. Behneman represent 50 of their original holdings in the [434] company?

Mr. Ferguson: Yes, or their predecessors in interest.

The Court: I will continue the trial until two o'clock and give you an opportunity to look over your notes.

(A recess was here taken until two o'clock p. m.)

[435]

Afternoon Session—2:00 O'clock

The Court: You may proceed.

Mr. Jordan: In order to expedite matters, your Honor, I am going to ask counsel for some further stipulations in order that we may get the basic facts in the record.

Mr. Ferguson, from the date of the confirmation of the Hendy reorganization plan on March 24, 1936, or at least shortly thereafter, the board of directors of the Joshua Hendy Company consisted of five directors, did it not?

Mr. Ferguson: Yes, all the time.

Mr. Jordan: And the plan, as a matter of fact, so specified, and the number of five continued right up to the present time?

Mr. Ferguson: There were some vacancies that were filled, that is all.

Mr. Jordan: The defendants Mayman, Moores and Price were directors of The Joshua Hendy Iron Works from April 8, 1936 until March 17, 1941; will you so stipulate, that the defendants Mayman, Moores and Price were directors of the Joshua

Hendy Iron Works from April 8, 1936, to March 17, 1941?

Mr. Ferguson: Yes, that is true.

Mr. Jordan: That will be so stipulated?

Mr. Ferguson: Yes.

Mr. Jordan: Will you stipulate that the defendants Mayman and Moores were on April 8, 1936, nominated under paragraph 7 of the plan to the board?

Mr. Ferguson: That is right, by the Class C creditors, that is, notes secured by real property, and D creditors, notes otherwise secured, those were to nominate three of the directors, and those were two of the three. [436]

Mr. Jordan: And the Bank of California was the largest secured creditor?

Mr. Ferguson: About 95 per cent, and also about 85 per cent. of the unsecured.

Mr. Jordan: And on April 8, 1936 the defendant Price was nominated to the board by the unsecured creditors?

Mr. Ferguson: That is true, under the plan of reorganization the secured creditors were to elect three directors and the unsecured one. The Bank of California was the largest unsecured creditor, but the plan provided that he should be nominated as a representative of some creditor other than the Bank of California, so he was elected to represent the unsecured.

Mr. Jordan: Will it be stipulated that the de-

defendant Bassick was a director from March 15, 1937 until March 17, 1941?

Mr. Ferguson: That is so stipulated.

Mr. Jordan: Will it be stipulated that Mr. Bassick was nominated to the board by the secured creditor classes B, C and D?

Mr. Ferguson: Well, he filled a vacancy from those classes; whether he was nominated separately, I don't know. I guess that is correct.

Mr. Jordan: Will it be stipulated that the defendant Mr. Webber was living and acting as a member of the board at the time that the plant was sold on or about November 15, 1940?

Mr. Ferguson: Yes, he was.

Mr. Jordan: And he, likewise, was elected as a member of the board on March 15, 1937, and he continued to act as a member of the board until his death, sometime early in the year?

Mr. Ferguson: That is true. He was the representative of the stockholders of the debtor and appointed by them.

Mr. Jordan: Will you stipulate that Bassick, Hyland and [437] Levit were likewise employees of The Joshua Hendy Iron Works continuously from March 24, 1936 until about November 15, 1940, when the plant at Sunnyvale was sold?

Mr. Ferguson: That is true of Mr. Levit and Mr. Hyland. Mr. Bassick was the trustee, and I do not believe that legally he was an employee. He was trustee up till January, 1937, and thereafter he was employed and subsequently became president, I believe on March 16, 1937.

Mr. Jordan: In any event he could be characterized as an employee of the company from January 27, 1937 until the sale of the plant in November, 1940?

Mr. Ferguson: Yes, I believe that is true.

Mr. Jordan: Now, Mr. Hyland and Mr. Levit were elected as vice-presidents of the Hendy Company on April 22, 1936, were they not?

Mr. Ferguson: Mr. Morris Levit was vice-president in charge of sales, appointed on April 20, 1936, and Mr. Hyland vice-president in charge of manufacture.

Mr. Jordan: And they continued to hold this office, not only during the time of reorganization, but up to March 15, 1941?

Mr. Ferguson: I cannot stipulate as to that, because I understand Mr. Levit was employed by the purchaser of the plant in an additional capacity, and Mr. Hyland, I don't know whether he left when the plant was sold, or worked for a short while and left. I don't know in what capacity he was employed.

Mr. Jordan: I am referring to Mr. Hyland and Mr. Levit after the sale of the plant in November, 1940, only as officers of the company, in the sense that they continued to act as vice-presidents of the company in charge of sales and in charge of manufacture up to March 15 of this year.

Mr. Ferguson: I think that is correct. [438]

Mr. Jordan: Mr. Bassick was president of the company from March 15, 1937 to March 17, 1941.

Mr. Ferguson: Yes, that is correct.

Mr. Jordan: And the defendants Mayman, Moores, Price, Webber, and Bassick were directors of the Hendy Company continuously from March 15, 1937, to March 17, 1941, or at least up to the termination of the voting trust created by the plan on or about the 21st of December, 1940, and were acting as voting trustees under the plan, as well as directors.

Mr. Ferguson: Yes. The plan provides that the board of directors as made up from time to time constitute voting trustees; they were not already voting trustees, but as they succeeded to directors they automatically became voting trustees.

Mr. Jordan: But it is stipulated they were continuously directors of the company during that period, and likewise were voting trustees.

Mr. Ferguson: That is true, except Mr. Webber ceased to act sometime in December, before his death.

Mr. Jordan: Now, as such voting trustees the defendants Mayman, Moores, Price, Webber and Bassick on the 20th of December of last year held 2212½ shares of the capital stock of the Hendy Company, which represented 50 per cent. of the outstanding shares of 4425 shares at the time the plan was confirmed?

Mr. Ferguson: I do not follow your stipulation.

Mr. Jordan: I will reframe it. It has already been stipulated that Mr. Mayman, Mr. Moores, Mr. Webber, Mr. Price and Mr. Bassick were voting

trustees, constituted as such on the plan by reason of the fact that they were directors of the Hendy Company from March 15, 1937 up to the date of the termination of the voting trust on December 21, 1940: That is correct, is it [439] not?

Mr. Ferguson: Yes.

Mr. Jordan: During the period commencing with March 24, 1936, when this court approved the plan of reorganization of The Hendy Company and thereafter as they became directors they likewise became voting trustees and holders of 50 per cent. of the outstanding stock of the company which was surrendered to them as voting trustees under paragraph 6-G of the plan?

Mr. Ferguson: No, that is not correct. I think you are under a misapprehension. The fact is that the stock, most of it was surrendered and they became holders of all of the stock as voting trustees. 50 per cent. of it was deposited by the stockholders and held in trust, and 50 per cent. under 6G-2 was held for distribution. They did not hold all of that stock, because, as you know, Dr. Behneman held some 1244½ shares of stock and did not surrender his stock until last year.

Mr. Jordan: June, 1940.

Mr. Ferguson: That is correct.

Mr. Jordan: In any event, in June, 1940, those gentlemen, as voting trustees, were holding a total of 2212½ shares.

Mr. Ferguson: Yes.

Mr. Jordan: And out of this number of shares

622 $\frac{1}{4}$ represented stock belonging to Dr. Behneman, and 303 $\frac{1}{2}$ represented shares surrendered by Mrs. Shores.

Mr. Ferguson: Yes.

Mr. Jordan: Will you stipulate on November 4, 1940, the Hendy Company granted an option to McDonald & Kahn, Inc., for the purchase of the Sunnyvale plant of the company, together with all equipment situated in the plant, and materials on hand for a total basic price of \$426,000? [440]

Mr. Ferguson: Substantially that is true. I think the option is the best evidence of what it was.

Mr. Jordan: If you want to put the option in I have no objection, but if that is substantially true will you so stipulate?

Mr. Ferguson: Yes, I will. The only variance that there might be would be certain deductions to be made between the parties by reason of pending adjustments.

Mr. Jordan: That option would have expired at noon on November 15, 1940.

Mr. Ferguson: I believe so. Anyway, it was exercised before it expired.

Mr. Jordan: The option was granted pursuant to a resolution of the board of directors on November 4, 1940?

Mr. Ferguson: Yes, I believe so. It is all of record.

Mr. Jordan: If there is any question about it——

Mr. Ferguson: No, that is correct. I will so stipulate.

Mr. Jordan: Will you stipulate that at the time that this option was granted on November 4, 1940 for the sale of the Sunnyvale plant, that no member of the board of directors was at that time a stockholder of the company?

Mr. Ferguson: No I won't stipulate to that. Two of them represented the second largest stockholder; I refer to Mayman and Moores. The Bank of California was and always has been since the reorganization the second largest stockholder.

Mr. Jordan: Mr. Mayman and Mr. Moores having been nominated by the Bank of California to the board some years ago.

Mr. Ferguson: That is correct.

Mr. Jordan: They continued to act on behalf of the Bank of California?

Mr. Ferguson: That is true. [441]

Mr. Jordan: As individuals they did not hold any stock. Mr. Bassick was not a stockholder, nor was Mr. Price, nor Mr. Webber on that date, was he?

Mr. Ferguson: I don't know about Mr. Webber—the other two did not. I believe Mr. Webber either held it, himself, or it was in his wife's name, I have forgotten which.

Mr. Jordan: Would it be too much trouble to refer to the record?

Mr. Ferguson: On November 4 I believe there was stock standing in the name of his wife and other of his relatives, but it was subsequently trans-

ferred to his name as an interest in his wife's estate, but I do not think it was on November 4.

Mr. Jordan: Then it will be stipulated, Mr. Ferguson, that as an individual no member of that Hendy board on November 4, 1940 was the owner of any stock?

Mr. Ferguson: Not of record, no. That is all I can stipulate to.

Mr. Jordan: Now, this morning you stipulated that there was to be paid under the deferred payment plan set up in the plan of reorganization \$569,969. That was your figure, and I accepted it. The plan specified \$549,317, of course that is 1935, and I accepted the figure of \$569,969. That figure was the amount that was to be paid in accordance with the provisions of the plan to the creditors' account.

Mr. Ferguson: The principal amount.

Mr. Jordan: Will you stipulate that of that figure \$569,969, \$274,966.57 still remained unpaid on November 4, 1940?

Mr. Ferguson: Yes, that is right. That is the principal amount.

Mr. Jordan: Will you stipulate that on or about November [442] 15, 1940, McDonald & Kahn, Inc., or Felix Kahn, as assignee, exercised that option?

Mr. Ferguson: Felix Kahn, as Trustee, exercised that option.

Mr. Jordan: Will you stipulate that on November 15, 1940, at a special stockholders' meeting, the vot-

ing trustees controlling all of the outstanding stock voted their approval of the sale?

Mr. Ferguson: There were three meetings held, one of the voting trustees, and they ratified it; one of the stockholders, and they ratified it, and one of the directors, and they ratified it.

Mr. Jordan: Will you stipulate that the sale of the Sunnyvale plant was thereupon, or shortly thereafter, consummated and title transferred to the purchaser of the plant?

Mr. Ferguson: It was consummated with this reservation, because of the work in progress it could not be done, but substantially it was consummated and title was passed at that time.

Mr. Jordan: Will you stipulate that on or about November 19, 1940, the Hendy Company received payment of a portion, at least, of the consideration to be paid for that plant?

Mr. Ferguson: I do not have that figure available. They did receive payment of a portion, but the balance is subject to adjustment.

Mr. Jordan: Have the adjustments been completed to this date?

Mr. Ferguson: No.

Mr. Jordan: Are you able to furnish the total amount that has been paid on account of the purchase price to The Hendy Company on December 20, 1940?

Mr. Ferguson: That will have to be computed. I do not have the figures. We can compute it and we can have it for you tomorrow, subject to such ex-

planation, of course, as we desire to [443] make in the record.

Mr. Jordan: Will you stipulate that the Sunnyvale plant and equipment of The Jushua Hendy Iron Works on November 15, 1940 constituted all of the operating assets of the company?

Mr. Ferguson: That, I think, is asking for a stipulation of a legal conclusion. I would say that it was substantially all operating, but whether there was any property or not I don't know.

Mr. Jordan: Let me ask you if you will stipulate to this, would you stipulate that upon consummation of the sale of the Sunnyvale plant and the transfer of the title, that thereafter The Jushua Hendy Iron Works' only remaining assets consisted of cash in bank, accounts receivable, and a lot situated in San Francisco in North Beach, a Nash automobile, and some office furniture in the San Francisco office?

Mr. Ferguson: I cannot so stipulate. That is substantially it, but there were other investments of a minor nature they had, of doubtful value, of questionable value. I cannot so stipulate. I will say of what there was substantially that is the bulk of it.

Mr. Jordan: Will you stipulate with the exception of the plant at Sunnyvale the Hendy Company neither owned or operated any other factory?

Mr. Ferguson: That is right.

Mr. Jordan: And that their business, as far as the manufacturing part was concerned, was conducted at the Sunnyvale plant?

Mr. Ferguson: That is true.

Mr. Jordan: Will you also stipulate that as a part of the option agreement it was provided that if the option were [444] exercised and the sale of the plant consummated that the Joshua Hendy Iron Works would have to thereafter discontinue the use of that name.

Mr. Ferguson: In other words, they bought the name together with the business.

Mr. Jordan: Yes. Will you stipulate at the meeting of the directors held on November 19, 1940 a resolution was adopted authorizing the change of the corporate name to Hendy Realization Company?

Mr. Ferguson: That is correct, I will stipulate to that. A stockholders meeting was held the same day approving the directors' action.

Mr. Jordan: And thereafter proceedings were instituted which brought about the legal change in name?

Mr. Ferguson: Correct, completed on December 2.

Mr. Jordan: Now, within the period between November 15, 1940 and December 31, 1940, all of the \$274,965.57 which was still owing creditors under the plan was fully paid, was it not?

Mr. Ferguson: That is correct.

Mr. Jordan: Will you stipulate that at a meeting of the board of directors of the company held on December 4, 1940, additional compensation for the year 1940 was voted to the defendants, Bassick, Hyland and Levit in the following amounts: Mr.

Bassick \$40,000; Mr. Hyland, \$20,000; Mr. Levit \$20,000?

Mr. Ferguson: No, I won't so stipulate. That was not the fact. The fact was, and the resolution shows that that was voted to them, not for 1940, but for the entire time from the time of reorganization, from March, 1936, and the resolution so shows.

Mr. Jordan: I propose to introduce that resolution later, [445] Mr. Ferguson, and in any event it will speak for itself.

The Court: If you have it why don't you introduce it now?

Mr. Jordan: I am about to read, if counsel permits, from the sworn answer to interrogatories propounded by respondents Behneman and Shores in this matter sometime ago.

The Court: I am wondering if the record is not here.

Mr. Jordan: I am perfectly willing to read it from the minute book. I assume that these, having been prepared by counsel, would be correct.

Mr. Ferguson: That is an exact copy. I would like to inquire what the purpose of this line of inquiry is, because these payments are not involved in this case. Counsel has another suit, as I stated, pending in the State Court.

Mr. Jordan: I believe that the court will be interested in knowing exactly what became of the proceeds of the sale of the plant, and I propose to connect this later on by showing that the only way that they could have paid \$300,000 on December 4,

1940, was by resorting to the proceeds of the sale of the plant; in other words, a sale of the capital assets. This money did not come out of earnings; it could not have, because they did not have enough on hand to pay it. We expect to prove they dipped into the proceeds of the sale of the plant to pay off \$274,000 odd that they still owed under the provisions of the plan which were to entirely mature in a matter of four or five months. Therefore, I think it is highly material to the court, and your Honor so ruled when you overruled the objections to that interrogatory.

The Court: Do you make that as an objection?

Mr. Ferguson: I object, in the first place, to this line of inquiry on the ground that the bonuses are not here involved. We have no desire to deprive the court of all the facts, but we [446] must not try other cases with this case. The second point is, this claim is going to involve an accounting of that year to determine where the money came from to pay that.

The Court: How are you going to ascertain that without examining the books?

Mr. Jordan: I believe that I can establish by evidence that if the proceeds of the sale of their particular assets had not come into the company it would have been impossible for them to have declared a bonus or additional sums of \$103,000 and at the same time, within a matter of days, also paid off all the remaining obligations under their plan of reorganization.

The Court: I will overrule the objection. You are now going to read from the answer to the interrogatories.

Mr. Jordan: In which, your Honor, this resolution that we have been discussing of December 4, 1940, which declared this extra compensation, is set forth.

The Court: You may read it.

Mr. Jordan:

“The President stated that the first business of the meeting was the consideration of Mr. Moores’ suggestion under advisement at the previous meeting, and the various proposals presented at the meeting of the Board of Directors on December 2, 1940, relative to the compensation of certain of the officers and employees of the corporation. Further discussion upon the matter was thereupon had, at the conclusion of which it was moved by Director C. B. Moores, seconded by Director A. Webber, and unanimously carried—Director W. R. Bassick, however, expressly not participating in said vote—that the following resolution be adopted (expressly, however, without prejudice to the right of the Board, acting as Voting Trustees pursuant to [447] the confirmed plan of reorganization of the corporation, to further reward the managing officers of the corporation for their services by the distribution of capital stock of the corporation as provided, inter alia,

in Paragraph G-2 of said plan of reorganization):

“ ‘Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have become sound, businesslike, and satisfactory in condition; and

“ ‘Whereas, the achievement of this fact has been made possible only by the unselfish and unremitting efforts and diligence of certain of its officers and employees since its reorganization; and

“ ‘Whereas, throughout this entire period, this corporation has not paid such officers and employees for their services in accordance with the full value thereof to this corporation, but said officers and employees have been paid therefor and have accepted substantially less than the value of their said services to this corporation in consideration of the fact, and upon the representation of this Board of Directors, that a further payment, which with the amount already paid, would constitute a fair payment therefor, would be made at a later but the earliest expedient date; and

“ ‘Whereas, the affairs and position of this corporation are now such that said officers and employees can be paid for their said services, and it is fair and just that said offi-

cers and employees should be [448] rewarded for their said services and paid therefor, and for the severance of their employment and interference with their vacation and other rights occasioned by the sale of the Sunnyvale plant and properties of this corporation; and

“ ‘Whereas, it appears to be for the best interests of this corporation that the following resolution be adopted:

“ ‘Now, therefore, be it resolved, that this corporation forthwith pay the following amounts to the following of the officers and employees of this corporation in recognition, appreciation, payment, and reward for their exemplary and valuable services to this corporation:

W. R. Bassick.....	\$40,000.00
E. M. Hyland.....	20,000.00
M. Levit	20,000.00
C. B. McAulay.....	10,000.00
C. E. Birkenbeul.....	3,000.00
J. M. Brown.....	3,000.00
J. L. Whitehead.....	1,000.00
R. N. Parkin.....	1,000.00
Frank L. McAdam.....	500.00
Margaret Terry	500.00
C. Cortage	500.00
A. R. Sillers.....	500.00
W. C. Theller.....	500.00

R. M. Spedding.....	500.00
L. A. Wall.....	100.00
Grace Miguelgorry	100.00
Juliette del Castillo.....	100.00
Ruth Barbier	100.00
Gerda Mangels	100.00
Thelma Broeder	100.00

“ ‘And be it further resolved, that the officers of this corporation be and they are hereby authorized and directed to take such steps and to make such payments as shall be necessary or desirable to effectuate and carry this resolution into effect.’ [449]

Inasmuch as the following portions of this resolution following are pertinent, I will state them. This is not part of the same resolution just referred to. In the same minutes they refer to the voting to Mr. Bassick of the Nash automobile, which belonged to the company. Will it be stipulated that it was voted to him under this condition, that while the automobile might be useful in the winding up of the affairs of the corporation, so as to avoid the expense of its operation, it was given to him with the understanding that he would keep it up, and title was authorized to be passed to Mr. Bassick.

Mr. Ferguson: In that connection, the minutes that have just been read are of an adjourned meeting. the first part of that meeting having been held upon this question, and at some length reported, and

this was an adjourned consideration of that part of the meeting, and at a subsequent meeting held on December 20 two additional names were added, those of William Vierra, \$250, and Willard Plummer, \$250, as having been omitted from the list in the resolution. I might point out in that connection that it shows that these services that they were making payment for were services during the entire time, since the plan of reorganization was confirmed.

The Court: Doesn't the resolution say that?

Mr. Ferguson: Yes, if your Honor please.

The Court: Maybe Mr. Jordan will stipulate to that fact.

Mr. Jordan: Are you referring to the resolution which I have just read?

Mr. Ferguson: Yes.

Mr. Jordan: That will speak for itself.

Mr. Ferguson: That will be subject to proof on our part if you won't stipulate to it. [450]

Mr. Jordan: Will you stipulate, Mr. Ferguson, that the total amount of the bonus declared on December 4, 1940, in the amount that I have just read, in extra additional compensation at that time was \$102,729.76?

Mr. Ferguson: Whatever the figure is.

Mr. Jordan: If you are not satisfied with that figure I want you to verify it; if that is correct I will ask for a stipulation.

Mr. Ferguson: You have read the figures in, and

subject to the amendment of \$500 additional on December 20th, whatever your total is is satisfactory.

Mr. Jordan: Now, on this subject of bonuses or additional compensation, we will direct the court's attention to the fact that that \$102,729 was for services only in 1940, not for previous years following the approval of the plan. Will you stipulate that the annual meeting of stockholders and creditors of the corporation held on March 21, 1938 additional compensation in the total amount of \$6000 was awarded to various employees of the company for the year 1937?

Mr. Ferguson: \$6000 total.

Mr. Jordan: As far as Mr. Bassick was concerned, he at that time received additional compensation of \$1800, did he not?

Mr. Ferguson: That is correct.

Mr. Jordan: As far as Mr. Hyland is concerned, he at that time received additional compensation of \$1200.

Mr. Ferguson: When I stated that is correct, I say that is what the resolution authorized. I am presuming it was paid.

Mr. Jordan: Are you in a position to stipulate that it was?

Mr. Ferguson: No, not without referring to the books.

Mr. Jordan: As far as the resolution is concerned, Bassick [451] \$1800, Hyland \$1200, Levit \$1200.

Now, I refer you to the annual meeting of stockholders held on March 20, 1939. Was there a board of directors meeting held on the same day?

Mr. Ferguson: Yes, there was.

Mr. Jordan: Will you stipulate that at that meeting a resolution was adopted whereby it was determined that Mr. Bassick and Mr. Hyland were to receive, commencing January 1, 1939, \$100 per month increase each in salary?

Mr. Ferguson: It so states in the minutes, yes.

Mr. Jordan: And at the same time Mr. Levit was allowed \$600 additional compensation for 1938, and additional compensation to other parties.

Mr. Ferguson: Perhaps it would be better for you to read the resolution.

Mr. Jordan:

“Mr. Bassick requested of the board authority to pay extra compensation where deserved, as a partial recognition of the work accomplished, especially in connection with the Grand Coulee Gate job. It was moved by Mr. Price and seconded by Mr. Mayman that the extra compensation be paid to the following employees in the amount set opposite each name, and salary increases from January 1, 1939 of \$100 per month be made to W. R. Price and E. M. Hyland, all subject to the approval of the absent director, Mr. Moores. W. Vierra \$100, M. Levit \$600, C. Birkenbuel \$150, C. McAulay \$150, J. Whitehead \$150, V. Kowell

\$250, A. Sillers \$100, R. Spedding \$150, W. Theller \$150." A total of \$1800.

"The motion was unanimously adopted. Mr. Bassick expressed the desire to bring the question of extra compensation up again for further consideration before the first of the coming [452] year."

Now, I will call your attention to the meeting held on—this would be the annual meeting of stockholders and creditors held on March 18, 1940, and ask if you will stipulate that a resolution was adopted at that meeting ratifying and approving the previous payment by the corporation on December 20, 1939 of bonuses as follows: Mr. Bassick \$2000——

Mr. Ferguson: A stockholders meeting?

Mr. Jordan: It may be a directors meeting, it is a meeting on that date.

Mr. Ferguson: There was a directors meeting on the same day. There was a resolution passed at the directors meeting, not the stockholders meeting.

Mr. Jordan: Does that resolution provide for the payment of additional compensation for that year, 1939, to Mr. Bassick of \$2000, Mr. Hyland \$1000, Mr. Levit \$450—the resolution reads as follows:

"The payment by the corporation on December 20, 1939 of the following bonuses totaling \$6000, and an increase in the salary of Mr. Levit of \$50 per month was approved on mo-

tion made by Mr. Price, seconded by Mr. Webber, and unanimously carried.”

Then follows “W. R. Bassick \$2000, E. M. Hyland \$1000, M. Levit \$450, Margaret Terry \$250, C. B. McAulay \$350, J. L. Whitehead \$300, C. E. Birkenbeul \$250, R. N. Parkin \$225, D. G. Burdick \$25, J. M. Brown \$200, F. L. McAdam \$50, L. A. Wall \$25, V. D. Kowell \$300, A. R. Sillers \$150, W. C. Theller \$150, R. M. Spedding \$150, W. G. Vierra \$100, W. K. Plummer \$25,” and that is totaled at \$6000.

The Court: Is that in addition to the allowance of ad- [453] ditional compensation in 1939?

Mr. Ferguson: That was all compensation in 1939, additional compensation; that is exclusive of the amount that was declared in 1940.

Mr. Jordan: There were two declarations in 1940. In the spring of 1940 there was a declaration under the resolution just read for the year 1939. The payment was in 1940; then there was a further declaration of a larger amount in the total sum of \$103,000 on December 4, 1940.

The Court: The additional compensation amounted to \$6000 for 1939?

Mr. Ferguson: It was declared in 1940 for the year 1939. Apparently, according to the minutes, it was paid in 1939. This is the first meeting they had and they approved of that.

Mr. Jordan: That was a ratification of the payment.

The Court: Ratification of the \$6000 payment?

Mr. Jordan: That is right. So we can summarize this matter of compensation, as far as Mr. Bassick, Mr. Hyland, and Mr. Levit are concerned, will you stipulate, Mr. Ferguson, that during the period from March 24, 1936, the date on which the plan of reorganization of this company was confirmed, to December 31, 1940 Mr. Bassick was paid by the Hendy Company inclusive of salary and bonuses the following yearly amounts: March 24, 1936 to December 31, 1936, \$6000; for the year ending December 31, 1937, \$7200; for the year ending December 31, 1938, \$9000; for the year ending December 31, 1939, \$10,100; and for the year ended December 31, 1940, \$50,801.82, or a total compensation during that period paid by the company to Mr. Bassick of \$83,101.82?

Mr. Ferguson: That is the answer to your Interrogatory No. 7, [454] and I believe that answer is right. It says, "The salary and other compensation exclusive of capital stock paid to W. R. Bassick as an officer and employee of the corporation, during the following periods were"——

Mr. Jordan: All I am asking is whether or not it is true those amounts were paid.

Mr. Ferguson: That is true.

Mr. Jordan: And the total amount paid to Mr. Bassick was \$83,101.82?

Mr. Ferguson: I did not add it up.

The Court: That is a matter of computation.

Mr. Jordan: Will you stipulate, as far as Mr.

Levit is concerned, that inclusive of salary and extra compensation for this same period, March 24, 1936 to December 31, 1940, that he in each year during that period received the following amounts: For the period from March 24, 1936 to December 31, 1936, \$4000; For the year ended December 31, 1937, \$4800; For the year ended December 31, 1938, \$6000; For the year ended December 31, 1939, \$6000; And for the year ended December 31, 1940, \$24,717.50?

Mr. Ferguson: Yes, I will stipulate that was his salary and other compensation.

Mr. Jordan: And the total of those amounts paid during that period to Mr. Levit was \$45,517.50?

Mr. Ferguson: Yes.

Mr. Jordan: And as far as Mr. Hyland is concerned, during this same period will you stipulate that the following amounts were paid annually, inclusive of salary and extra compensation and exclusive of stock dividend, for the year March 24, 1936 to December 31, 1936 \$3500; [455] for the year ended December 31, 1937, \$4775; for the year ended December 31, 1938, \$6000; for the year ended December 31, 1939, \$6700; and the year ended December 31, 1940, \$25,241.67?

Mr. Ferguson: That is correct. I might add, your Honor, that those figures are all taken from the Answer to the Interrogatories on file.

Mr. Jordan: Will you stipulate, Mr. Ferguson, that at a meeting of the board of directors of the Hendy Company held on December 20, 1940, a reso-

lution was adopted by the board authorizing a distribution to Mr. Bassick, Mr. Hyland, and Mr. Levit of the 2212½ shares of the stock of the company held by the board under paragraph 6-G 2 of the plan of reorganization?

Mr. Ferguson: That is correct.

Mr. Jordan: I think perhaps, as in the case of the extra compensation, that we might at this time read into the record the resolution.

The Court: There has been no question about that. Mr. Ferguson has not disputed that there was a resolution with reference to that.

Mr. Jordan: That is very true, but I thought you might like to hear the terms upon which it was done.

The Court: If you want to read it I have no objection.

Mr. Jordan: I am now reading from a resolution of the board of directors adopted on December 20, 1940:

“Upon motion duly made, seconded, and unanimously carried, Director W. R. Bassick, however, expressly not participating in the vote, the following resolution was adopted:

“ ‘Whereas, under the terms of the confirmed plan of reorganization of this corporation and the Voting Trust created [456] pursuant thereto, 2212½ shares of the capital stock of this corporation are now held by this Board, as Voting Trustees, free and clear of any claim, right, title, or interest therein by the former

stockholders surrendering the same, and subject to the distribution by this Board, in its sole discretion, either in whole or in part to the managing officers of this corporation as a reward for their management and the successful rehabilitation of the corporation's affairs; and

“ ‘Whereas, the officers of this corporation hereinafter named have, since its reorganization, rendered extremely valuable services to, and in the management of, the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the corporation from a point where the stockholders of the corporation had no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial;——’ ”

I would like to interrupt at this point, if your Honor please, to point out to your Honor that this resolution was adopted on December 20, 1940, a matter of something over a month following the sale of the Sunnyvale plant, and receipt of the purchase price. Now, proceeding:

“ ‘and

“ ‘Whereas, the financial position, business, and affairs of this corporation have, since its reorganization, evidenced steady and substantial improvement to the point that they have be-

come rehabilitated, sound, business-like, and satisfactory in condition, and such rehabilitation of the corporation's business so occasioned has made possible the advantageous sale of [457] the Sunnyvale plant and properties of the corporation just consummated; and

“ ‘Whereas, notwithstanding the value of such services to this corporation, the compensation of such officers has not been commensurate therewith, and this Board, through its Directors, has repeatedly represented to such officers that the compensation received by them during said period would be supplemented by additional reward as soon as in the opinion of the Board such further reward was practical and expedient; and

“ ‘Whereas, in addition, due to the sale of the corporation's Sunnyvale plant and the properties, the employment of certain of said officers has necessarily been severed, and their vacation and other rights interfered with; and

“ ‘Whereas, it appears just and proper that said 2212-1/2 shares of the capital stock of this corporation held by this Board, as aforesaid, be issued to said managing officers, subject to the condition hereinafter set forth, as a reward for their successful management and rehabilitation of the corporation's affairs; and it appears to be for the best interests of this corporation that the following resolution be adopted:

“ ‘Now therefore, be it resolved, that this Board forthwith distribute said 2212-1/2 shares of the capital stock of this corporation so held by it to the following persons in the respective amounts hereinafter set forth, in recognition, appreciation, payment, and the reward for their exemplary and valuable services to this corporation and as a reward for their management and the successful rehabilitation of the corporation’s affairs:

W. R. Bassick	812-1/2 shares
E. M. Hyland	700 shares
M. Levit	700 shares;

[458]

provided, however, that each such person shall, prior to, and as a condition precedent to, receiving such distribution of stock, waive in writing the right of such person to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of this corporation, in dissolution or otherwise, so that the said sum of \$85,848.75 may be prorated and paid by way of dividend, distribution, or otherwise (or set aside for such payment), only to the holders of the remaining 1907-3/4 shares of the outstanding stock of the corporation now held by this Board as Voting Trustees, to the end that said persons holding said 2212-1/2 shares hereby distributed shall only participate in dividends or distributions upon

the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

“ ‘And be it further resolved, that the President or Vice-President and the Secretary or Assistant Secretary of this corporation be and they are hereby authorized and directed, for and on behalf of this Board, to take all such steps and to execute all such documents as may be necessary or desirable to effectuate the distribution, transfer, and delivery of said stock to said officers, as aforesaid, and to fully effectuate the purposes of this resolution.’ ”

It will be stipulated, Mr. Ferguson, that the stock was distributed subsequently to Mr. Bassick, Mr. Hyland, and Mr. Levit in accordance with that resolution?

Mr. Ferguson: That is correct, upon their first executing waivers of any right to participate in \$85,848.75 distributed by way of liquidating dividends, that is equal to \$45 a share to the other stockholders. [459]

Mr. Jordan: I am going to ask you *to ask you* to refer to a stockholders meeting also held on December 20, 1940, immediately subsequent to the directors meeting at which that last resolution I just read was adopted. Now, referring to your minute book, will you stipulate that at the time of that meeting there were outstanding shares of the Hendy Company in the total amount of 4120-1/4 shares?

Mr. Ferguson: I believe that is correct, yes.

Mr. Jordan: The differential or reduction from 4425 shares which were outstanding at the time the plan was confirmed to 4120-1/4 came about by reason of the acquisition by the company of 305-3/4 shares from Mrs. Albertie M. Hendy, in the spring of 1940, in settlement of indebtedness that she had with the incorporation?

Mr. Ferguson: That is right, it was a compromise.

Mr. Jordan: And that 305-3/4 shares was completely extinguished and retired?

Mr. Ferguson: Cancelled.

Mr. Jordan: Will you stipulate that at this stockholders meeting of December 20, 1940, that the entire outstanding stock was represented in this respect: That the 1907-3/4 shares in which the old stockholders of the company had a beneficial interest were present through the voting trustees of the company, who were also directors, and that the 2212-1/2 shares which had previous to the directors meeting been distributed to Mr. Hyland, Mr. Bassick and Mr. Levit were represented by those gentlemen at that meeting?

Mr. Ferguson: That is correct.

Mr. Jordan: And all of the stock being present, with voting power, a resolution was adopted approving and ratifying all acts [460] and proceedings of the board of directors and officers of the company since the last previous annual meeting of the board held on March 18, 1940?

Mr. Ferguson: Yes, that is right.

Mr. Jordan: Will it also be stipulated that that was the same meeting of stockholders of December 20, 1940 in which a resolution was adopted authorizing the appropriate officers to commence proceedings for the dissolution of the Hendy Realization Company?

Mr. Ferguson: Yes, that was the first step in the winding up and dissolution of the corporation.

Mr. Jordan: Those dissolution proceedings are pending at this date, are they not?

Mr. Ferguson: The first certificate was filed, but no final action can be taken until the company's liabilities have been adjusted and final distribution of the assets.

Mr. Jordan: Will you stipulate that at a meeting of the voting trustees on December 21, 1940, the following day, a resolution was adopted terminating the voting trust created by the plan of reorganization, and authorizing that the voting trust certificates in the hands of old stockholders be called in and that new stock certificates evidencing the same amount of the voting trust certificates be delivered to the holders?

Mr. Ferguson: I will agree that in that resolution, which is rather lengthy, it recites the fact that under the plan of reorganization the voting trust was to terminate in five years and thereafter until all of the obligations had been paid. This was prior to that time and it was pointed out that all of the obligations had been paid or would have been paid

prior to that time and that therefore the voting trust should terminate and that the shares held in trust should be returned upon surrender of the [461] voting trust certificates held by them.

Mr. Jordan: There was also a directors meeting of the same date, was there not, December 21, 1940, at which a resolution was adopted authorizing payment of a first liquidating dividend of \$45 a share in favor of the beneficial owners of 1907-3/4 shares?

Mr. Ferguson: I will agree there was a directors meeting at which they moved that the trust be terminated, and upon its termination on the payment of all obligations they directed the payment of a liquidating dividend of \$45 per share be distributed to only 1907-3/4 shares and expressly not to go to the three officers who had received stock by reason of the fact——

Mr. Jordan: Just a moment, we are not arguing. I am asking for a stipulation.

Mr. Ferguson: That far I will stipulate.

Mr. Jordan: The total amount of that liquidating dividend so declared was \$85,848.75.

Mr. Ferguson: That is correct.

Mr. Jordan: That was so paid?

Mr. Ferguson: Yes.

Mr. Jordan: Will you stipulate that after the annual meeting of stockholders held on March 17, 1941, the following were elected as members of the board of directors——

Mr. Ferguson: We stipulated to that this morning.

Mr. Jordan: Mr. Ferguson, I am going to ask you for one further stipulation—I do not know whether you will be able to give it to me or not. Are you able to furnish the amount of cash on hand and the total amount of accounts receivable on the books of the company immediately prior to the sale of the Sunnyvale plant on November 15, 1940?

Mr. Ferguson: No. [462]

Mr. Jordan: You cannot do it?

Mr. Ferguson: No.

Mr. Jordan: Can you give me the total cash on hand on December 31, 1940?

Mr. Ferguson: It shows cash on December 31, 1940, \$9766.71, accounts receivable and notes receivable \$51,211.28, and current assets of that date of \$154.75, making a total as of December 31, 1940 of \$61,132.74. That, of course, is after all distributions had been made.

Mr. Jordan: That money was left after payment of the \$274,000 odd that was owing to the creditors under the plan of reorganization at the time of the sale and also after payment of the total of \$103,000, or thereabouts, on additional compensation declared in December.

Mr. Ferguson: That is right, and also after the payment of the \$45 dividend.

Mr. Jordan: But you cannot furnish me with the amount of cash on hand at November 15, 1940?

Mr. Ferguson: No. The only audit I have would be taken from the books.

Mr. Jordan: I would like to have the figure before the purchase price money was paid.

Mr. Ferguson: The nearest balance sheet I have, is as of September 30, 1940.

Mr. Jordan: Will you stipulate, Mr. Ferguson, that unless the sale of the Sunnyvale plant had been effected on or about November 15, 1940, it would have been impossible for the company to have declared and to pay additional compensation to employees and officers on December 4, 1940?

Mr. Ferguson: No. [463]

Mr. Jordan: Will you stipulate that during the period from March 24, 1936 to date the stockholders of the Hendy Company have never been paid any earned dividends?

Mr. Ferguson: I do not think they ever have in the entire history of the company, Mr. Jordan.

Mr. Jordan: That at least goes during the period I have just mentioned. Will you stipulate to this, Mr. Ferguson, that it would have been impossible in November or December, 1940, or at any time up to March 24, 1941, which would have been five years from the date of the confirmation of the plan, for the company to have paid the \$274,000 odd, stipulated under the plan, except for the sale of the Sunnyvale plant?

Mr. Ferguson: I will not stipulate to that.

Mr. Jordan: Mr. Ferguson, is Mr. Bassick here in court?

Mr. Ferguson: No, he is not.

Mr. Jordan: Do you represent him?

Mr. Ferguson: I do.

Mr. Jordan: Do you expect him to be here during the course of the trial?

Mr. Ferguson: No, I do not. I am not advised of Mr. Bassick's whereabouts, or where I could locate him. Mr. Bassick has for a considerable period of time been in very poor health, and has to be assisted in everything that he does; and because we believe that everything that he could have testified to has been proved we could not contemplate calling him, on account of his very poor health.

Mr. Jordan: There are certain matters which I believe to be pertinent in this case which could only be testified to by Mr. Bassick. Mr. Bassick, as I understand it, lives in Mill Valley, but he has been on an extended trip for some months. I say that [464] advisedly, because we have attempted to serve him with process during several months' period. In talking with Mr. Ferguson over the 'phone as to when he would return from this extended trip, Mr. Ferguson told me that he was doubtful that he would be able to appear in court. I told him that I wanted him to be here, and that I would insist on his being here, unless he physically was unable to and a doctor could so certify. I have had a subpoena issued for him, that has been sent over to Mill Valley, and we are informed that Mr. Bassick has again left town on a trip, to be gone for a week or so. Mr. Bassick is a party to this action and he has knowledge and possession of facts that I think are material to this case. We want to call him as a

witness if it is humanly possible, but every effort on our part to get him through legal process has failed. You do not know where he is?

Mr. Ferguson: No, I do not. Mr. Jordan asked me if I would have him here, a week or so ago, and I advised him I would not, that on account of his physical condition he would be unable to testify as a witness, but I told him all the other officers would be here to testify, and he said that he was not satisfied, and I told him he would have to take such steps as were available to him. I do not know where he is now.

Mr. Jordan: I have done everything I could do through legal process to bring him in. Of course, I could not serve him if he is not available to be served. Do you think, Mr. Ferguson, that it would be absolutely impossible for you to communicate with him?

Mr. Ferguson: I am positive of that. We have no knowledge of where to communicate with him.

Mr. Jordan: We will call Mr. Levit. [465]

MORRIS LEVIT,

Called for the Plaintiff and Respondent; Sworn.

Mr. Jordan: Q. Mr. Levit, you are the Morris Levit that was referred to in various stipulations here? A. Yes.

Q. You are one of the defendants in this matter?

A. Yes, I am.

(Testimony of Morris Levit.)

Q. And you are one of the petitioners?

A. Yes.

Q. You are the Mr. Levit who acted as a vice-president of the Joshua Hendy Iron Works and later the Hendy Realization Company from April, 1936 until March of this year. Is that correct?

A. Right.

Q. As a matter of fact, you have been associated with The Joshua Hendy Iron Works for many years?

A. Very many years.

Q. Can you tell us how many?

A. Well, next month I will figure up my fifty-second year.

Q. With the company?

A. Yes.

Q. At present you are associated, are you not, with the new company of the same name?

A. Yes, I went with them since they took over.

Q. There is at the present time a company, a corporation, a Nevada corporation, incorporated under the name of The Joshua Hendy Iron Works?

A. Yes.

Q. And that corporation is the present owner of the plant at Sunnyvale?

A. That is right.

Q. Formerly owned by the corporation now known as the Hendy Realization Company?

A. That is right.

Mr. Jordan: By the way, your Honor, I would like the record to show that Mr. Levit is being

(Testimony of Morris Levit.)

called pursuant to Rule 43-B of the Rules of Civil Procedure, as an adverse witness.

Q. Now, I do not think we have to go back through the entire four years, but will you state—it is true, is it not, that from [466] 1932, May of 1932, until the Hendy Company went into corporate reorganization under Section 77-B in 1935 that the company was under a State receivership?

Mr. Ferguson: I will so stipulate.

A. Yes, I think the beginning of 1932.

Mr. Ferguson: May 17, 1932.

Mr. Jordan: Q. During a portion of that period of the State receivership Mr. Fred Behneman, the father of Dr. Behneman, one of the parties in this proceeding, was trustee, was he not?

A. No, he was a receiver.

Q. After Mr. Fred Behneman's death Mr. Bassick acted as receiver? A. Yes.

Q. You worked under first Mr. Behneman, and later Mr. Bassick as receivers during that period?

A. That is right.

Q. What was the nature of your duties at that time? A. I was manager of sales.

Q. Can you describe for us exactly what you did during that period, the nature of your duties?

A. It was my responsibility to make, or cause to be made, all of the sales, and the prices that would net a profit. Those were my principal duties.

Q. Would it be correct to say you were sales manager of the company? A. That is right.

(Testimony of Morris Levit.)

Q. As a matter of fact, you held that same position for many years prior to the State receivership under Mr. Behneman, did you not?

A. For a great number of years, yes.

Q. Will you state what your salary was during the State receivership per month, if it was so paid during that period?

A. Well, in the beginning my salary was at the rate of \$700 a month.

Q. What do you mean by "in the beginning"?

A. Well, when the receivership first started, and for a number of years prior to [467] that.

Q. How much was your salary for, say, a period of two or three years, two years prior to the State receivership?

A. \$700 a month with additional bonuses at the end of the year.

Q. And during the State receivership for a portion of the time you received \$700 a month?

A. That is, to the best of my recollection, yes. After that there were two reductions, voluntary reductions on my part, I think of \$100 each, so that when Mr. Bassick came in I had been paid up to that time \$500 a month.

Q. What was your compensation per month during the period of the reorganization being under the supervision of this court?

A. For a short time \$400, then \$450, and then for several years I got a bonus with my salary, \$6000 a year.

(Testimony of Morris Levit.)

Q. That bonus was paid during the course of the reorganization of the company under 77B?

A. That is right.

Q. You heard the stipulations by Mr. Ferguson and myself?

A. I listened to some of them, yes.

Q. We have the gross amount of your compensation, Mr. Levit, inclusive of both salary and additional compensation for the period from March, 1936 to the winter of 1940, at least to the time the sale took place. Can you tell us what your monthly salary was during that period of time?

A. I cannot tell you any better than I have already told you, Mr. Jordan. I have not got the records, but the books will reveal that, won't they?

Q. They will, but I thought perhaps you would remember.

A. No, I don't remember any better than what I have already told you.

Mr. Jordan: I think that is all, Mr. Levit. Thank you.

Mr. Ferguson: No questions. [468]

ELMER M. HYLAND,

Called for Plaintiff and Respondents; Sworn.

Mr. Jordan: May the record show that Mr. Hyland is also being called as an adverse witness under Rule 43-B of this Court?

(Testimony of Elmer M. Hyland.)

Q. Mr. Hyland, you are the E. M. Hyland named as one of the defendants in this matter?

A. That is right.

Q. You are also the Mr. Hyland who has been referred to as one of the vice-presidents of The Joshua Hendy Iron Works, commencing in April, 1936 and through to March of this year?

A. Yes.

Q. As a matter of fact, you were never a director of the company during that period?

A. That is right.

Q. But you were acting in the capacity of vice-president in charge of manufacturing?

A. Yes.

Q. You are president of the company at the present time, are you not?

A. Yes.

Q. And also a director?

A. Yes.

Q. Having been elected both as a director and as president on March 15 of this year?

A. Yes.

Q. Now, you also were in the employ of The Joshua Hendy Iron Works for many years prior to 1935, when the company went into reorganization in this matter?

A. Yes.

Q. You were with the company all during the State receivership?

A. Yes.

Q. Immediately prior to the reorganization proceedings, and for a long time prior to the State receivership?

A. Some 33 years total.

Q. Will you state just what the nature of your

(Testimony of Elmer M. Hyland.)

duties were up to the time that the company became involved in the corporate reorganization proceeding in this court in 1935?

A. From 1935 up to the time of the sale? [469]

Q. No, prior to 1935.

A. Prior to 1935 every position in the plant, practically, from timekeeper up to assistant manager.

Q. What was your position during the State receivership?

A. Assistant manager, that is, under Mr. Behneman; then when Mr. Bassick came I was plant manager and vice-president in charge of manufacture.

Q. Now, how long did you hold the position of assistant manager?

A. I would say some four or five years.

Q. And what, generally, was the character of your work during that time, what were your duties?

A. Well, I had charge of the manufacture under the plant manager.

Q. Well, you supervised the manufacture in the plant at Sunnyvale, did you?

A. Yes, I assisted in the supervising of it under the plant manager.

Q. What was your monthly salary during the time you were acting as assistant manager?

A. That was very varied. I think there were several changes, both up and down, but I do not recall each period just what the amount was.

(Testimony of Elmer M. Hyland.)

Q. Haven't you any idea?

A. About \$350 a month, plus bonuses.

Q. What would the bonuses bring the monthly compensation to?

A. I would not want to say, because I am not sure on my recollection.

Q. After you left the position of assistant manager I think you said a moment ago you became plant manager.

A. Plant manager and vice-president of manufacture.

Q. Was that during the period of the reorganization in this court, or was that immediately following the confirmation of the plan?

A. That was just about the time Mr. Behneman came in, which would be sometime in 1934, about April, 1934.

Q. What did your duties consist of when you took that position? [470] Were they any different from your work as assistant manager?

A. Very definitely. I had full charge of operating the plant; after Mr. Behneman came in as manager of the plant I was left the entire responsibility of running the plant.

Q. That was about the time that Mr. Bassick came in?

A. That is true.

Q. First, as receiver?

A. Yes.

Q. What was your salary as plant manager?

A. When I first started, I am not at all sure, but I think it was in the neighborhood of \$250 or \$275

(Testimony of Elmer M. Hyland.)

a month. I know it was when Mr. Bassick came in, and I figure that was about the same as I was getting when I was working part time as assistant plant manager.

Q. Now, how long did you continue at that salary before it was increased?

A. I don't remember.

Q. You don't remember? A. No.

Q. You have heard the stipulation here as to the total amount of compensation that you received, inclusive of salary and additional compensation from March 24, 1936 to the end of 1940.

A. I have.

Q. That recalls to your mind those figures are correct?

A. I could not say that, I would not say.

Mr. Ferguson: Just a moment.

Mr. Jordan: I will withdraw the question.

Q. Now, where were Mr. Bassick's headquarters immediately following his becoming receiver in the State receivership? A. In San Francisco.

Q. And did they continue in San Francisco after he became trustee under the 77B reorganization proceeding? A. Yes.

Q. They continued in San Francisco, did they not, even after the company came out of 77B and right up to the time the plant was [471] sold?

A. Yes, although he made frequent visits to the plant at Sunnyvale about twice a week.

(Testimony of Elmer M. Hyland.)

Q. Were you in a position to observe what Mr. Bassick did between March, 1936 and the time the plant was sold?

A. Only when he was at the plant, but I knew nothing about what he was doing in San Francisco, not in detail.

Q. He had nothing to do with supervising the work at the plant in Sunnyvale?

A. I conferred with him very much, and we consulted on various matters that came up.

Q. By that I mean that he was down there not regularly, but infrequently?

A. About twice a week, and he would take trips through the shop and look over the work with me.

Q. The rest of the time that he was not making these bi-weekly trips to the plant at Sunnyvale, as far as you know he was in the office at San Francisco?

A. Well, he was always accessible by telephone.

Q. Now, Mr. Hyland, will you, having been an employee and plant manager at Sunnyvale for a great number of years, describe exactly what type of product you put out down there? What did The Joshua Hendy Iron Works put out?

A. Well, I would say all types of machinery, but principally mining machinery and machinery for hydroelectric power plants.

Q. The company also did a general foundry business, did it not?

A. That is true.

Q. That general type of activity was conducted

(Testimony of Elmer M. Hyland.)

as a manufacturer of machinery and the conducting of the general foundry business right up to the time that plant was sold in November, 1940?

A. Yes.

Q. Did you have occasion to go to Washington on behalf of The Joshua Hendy Iron Works at any time during 1940 for the purpose [472] of conferring on the possibility of obtaining a Navy contract for that company?

A. I was in Washington and saw the Navy in that connection, as well as the Army.

Q. About when was that?

A. About September, the latter part of September.

Q. September, 1940? A. That is right.

Q. How long did you spend in Washington on that occasion? A. Oh, about a week.

Q. Did you just make that one trip, or did you return?

A. I returned later after the company was sold.

Q. You returned after the company was sold?

A. That is right.

Q. And you made one trip to Washington in September of 1940 which was a matter of a month and a half or so prior to the consummation of the sale of the plant? A. That is right.

Q. You discussed the possibilities of a contract with the Navy Department?

Mr. Ferguson: One moment. I would like to in-

(Testimony of Elmer M. Hyland.)

quire what the purpose of this line of inquiry is leading to.

Mr. Jordan: I wish to establish by this witness, your Honor, that on November 15, or on November 4, as a matter of fact, 1940, when this company, the board of directors, granted an option to MacDonald and Kahn, that they were on the verge of securing a one million dollar contract, and there was a discussion at a meeting of the board on November 4, 1940, where they discussed the possibility of selling the plant, and in which sometime during the conversation some of the directors made various statements as to the strong probability of the company getting this one million dollar contract. I think it is pertinent to the issues in this case.

The Court: Why is it pertinent? There is no fraud alleged [473] here, as I understand it.

Mr. Jordan: No, there is no fraud alleged, your Honor, as far as specific allegations are concerned, but this is an equitable proceeding, and the conduct of the parties must speak for itself. It is a question for your Honor to decide whether that conduct was proper and equitable under all of the circumstances. I feel that it is pertinent and the Court should know the views of the various members of the board and the reasons behind the sale of that plant, because I think your Honor can almost take judicial notice of the tremendous expansion that this new company that bought the plant has made down there, and the very immense amount of defense work they are doing at the present time.

(Testimony of Elmer M. Hyland.)

The Court: When was the sale to the company?

Mr. Jordan: On November 15, 1940.

The Court: What is your objection?

Mr. Ferguson: Your Honor please, my objection to this testimony is this, that this case does not involve in any way any issue of whether the sale was properly or improperly made; the question here is had the corporation been successfully rehabilitated at the time they distributed that stock, and whether or not they might have got a contract had they continued to do business has no bearing and no relation in any particular upon that issue.

Mr. Jordan: They have said that this company was completely rehabilitated on December 20, 1940, a matter of a month and a half, or thereabouts, afterward they have sold the plant and gone out of business. Now, if they were rehabilitated and if their credit was reestablished so that they could do defense work, it does not sound reasonable that they would sell that plant, which had potentialities to do a great deal of work during this coming [474] period, and not from the sale of capital assets paid off \$274,000; still owning the plant they would have been able to pay that off and operate this business as a going concern of the stockholders, which I have no doubt was the intent of the plan; the intent of that plan was to rehabilitate this company, continue it as a going business, not to liquidate it right on the eve of probably the greatest period of activity they could have ever enjoyed.

(Testimony of Elmer M. Hyland.)

The Court: The objection is overruled. You may answer.

Mr. Jordan: Will you read the question?

(Question read by the reporter.)

A. Yes.

Mr. Jordan: I cannot ask you what your discussions were, but what was the character of the contract discussed?

Mr. Ferguson: May it be understood my objection runs to this entire line of inquiry?

The Court: Yes, let that be the understanding.

A. There was no particular contract discussed, but we did talk about certain work that might be done in our plant at Sunnyvale, part of which were torpedo tubes and gun mounts.

Mr. Ferguson: Q. As a matter of fact, The Joshua Hendy Iron Works did a considerable amount of government work during the first World War, did it not? A. Yes.

Q. What type of equipment or machinery were manufactured during that period at the Sunnyvale plant?

A. Engines and parts for boats.

Q. Did your discussion with the Navy Department on those occasions that you made the trip to Washington in September of last year deal with similar types of equipment?

A. Not at all, entirely different. [475]

(Testimony of Elmer M. Hyland.)

Q. But, nevertheless, the discussions did deal with the matter of equipment which was used by the United States Navy?

A. That is right.

Q. And to what extent did your negotiations progress at that time?

A. They were in the very early preliminary stages; it was a question of getting from us what we could produce, what they had to offer, and it was so far away that we could not determine at that time as to whether our tools would meet the close tolerances called for, because their drawings were incomplete, and we were only in a preliminary stage.

Q. As I understand you, Mr. Hyland, you did not discuss the manufacture by the Hendy Company for the Navy Department of any particular type of equipment or machinery on this particular occasion?

A. Oh, yes, we boiled it down to talk about the manufacture of a certain article.

Q. Was there any discussion regarding a contract for the manufacture by your company of that article for the Navy?

A. Yes, we had a preliminary estimate of the Navy as to what the probable cost would be per unit, and what the profit would be per unit.

Q. Taking all of the units discussed, which would have been embraced in this contract, in dol-

(Testimony of Elmer M. Hyland.)

lars in cents how much would it have run to the Joshua Hendy Iron Works?

A. That is impossible to say, because they were not in the position of being able to award any particular number of units, and they could not tell the value definitely because the designs had not been completed; it was in the early preliminary stage.

Q. Well, now, having completed your discussions with the Navy Department, and returned here again, did you upon your return make a report to the board of directors of the company? [476]

A. I made my report to Mr. Bassick.

Q. Mr. Bassick? A. Yes.

Q. Will you state what the substance of that report was?

A. Well, I described our conversations at Washington, and the nature of the work, and the possibility of our being able to produce that work, and as to what tools would be required; it was indefinite as to the quantity and quality, and I warned Mr. Bassick that it would entail a great expense for new equipment to go ahead with what the Navy would require.

Q. That was the substance of your report?

A. I think, generally, that covers it.

Q. Following the sale of the Sunnyvale plant to Felix Kahn and the later acquisition of the plant by the new corporation, known as The Joshua Hendy Iron Works, did you become an employee of that new corporation?

(Testimony of Elmer M. Hyland.)

A. I stayed on with the company for a few months after the sale.

Q. During that period you were engaged in what capacity? A. As plant manager.

Q. Can you tell us about when you left the employ of the new corporation?

A. February 5, 1941.

Q. Now, did you, subsequent to the trip to Washington in September, have occasion to return to Washington?

A. Yes, I went with the new president of the company back to the Navy Department again to look over the work that I had previously reported on to the old company.

Q. You discussed the matter of a contract on that trip, did you?

A. We discussed the prospect of getting some work and still they were not in a position to offer any definite contract, because the drawings were still incomplete.

Q. When was this second trip to Washington taken? A. In November, [477] I believe.

Q. November, 1940? A. Yes.

Q. That would have been between the 15th of November and the date of the sale?

A. It was after the sale of the plant.

Q. Now, you were with the new company until February of this year, Mr. Hyland?

A. Yes.

(Testimony of Elmer M. Hyland.)

Q. Do you know of your own knowledge whether or not the new company obtained any naval contracts?

Mr. Ferguson: One moment. I object to this question, not only on the grounds already specified, but the further additional ground that there is no standard of comparison, because there is no foundation or no showing that the new company possessed the finances, or anything else that was comparable with the facilities and finances of the old company. As a matter of fact, they were very dissimilar.

The Court: The objection is sustained.

Mr. Jordan: That is all, Mr. Hyland.

The Court: Any questions?

Mr. Ferguson: No questions.

The Court: We will have a recess of five minutes.

(After recess:)

CHARLES B. MOORES,

Called for the Plaintiff and Respondents; Sworn.

Mr. Jordan: May the record show that Mr. Moores also is being called under Rule 43-B of the Rules of Civil Procedure.

Q. Mr. Moores, you are an assistant cashier of the Bank of California, are you not?

A. Yes.

Q. And you have been for how long?

A. For the last seven or eight years—the last seven years.

(Testimony of Charles B. Moores.)

Q. You were assistant cashier of the Bank of California in April, [478] 1936, were you not?

A. Yes.

Q. In April, 1936 you first became a member of the board of directors of The Joshua Hendy Iron Works?

A. Yes.

Q. You have acted continuously in that capacity, have you not, up to the present time?

A. Yes.

Q. You are a director of the company to-day?

A. Yes.

Q. Now, as I understand, in the first instance that you were elected to the Hendy board of directors in April, 1936, April 8th, to be exact, of that year, and thereafter at each successive annual meeting of stockholders up to the present time, or at least until the annual meeting of November, 1940, you were nominated by the Bank of California, as a secured creditor of the Hendy Company?

A. Including the election of 1940.

Q. Did you hold any position prior to March of this year?

A. I was a vice-president.

Q. Vice-president during the entire period that you also acted as a director?

A. Yes.

Q. You are vice-president at the present time?

A. Yes.

Q. Now, as a director and vice-president of the Hendy Company during the period you have just stated, you had considerable contact with Mr. W. R. Bassick, did you not?

A. Yes.

(Testimony of Charles B. Moores.)

Q. Mr. Bassick, it has already been said, was president and general manager of the company practically from the time that the plan was confirmed in March, 1936, up to the sale of that plant. First of all, during the period from March 24, 1936 on which date the plan was confirmed, up to the annual meeting of stockholders in March, 1937, or until January of that year, Mr. Bassick was acting as trustee in the reorganization proceeding?

A. I don't recall the date, exactly.

Mr. Ferguson: That is correct; I will stipulate to that. [479]

Mr. Jordan: Q. In March of 1937 Mr. Bassick became a member of the board of directors of the company, president and general manager of the company, did he not?

Mr. Ferguson: So stipulated.

Mr. Jordan: Q. And acted in that capacity?

A. I don't know that.

Mr. Ferguson: On March 15, 1937 he became president.

Mr. Jordan: And Mr. Bassick acted in that capacity then continuously right through until the plant was sold in November, last year? A. Yes.

Q. Will you tell us just exactly what Mr. Bassick's duties were?

A. Mr. Bassick had general supervision of the entire operations and the sales and financial relations with the creditors of the company; that is,

(Testimony of Charles B. Moores.)

he was president of the company, and acted as such.

Q. Had you known Mr. Bassick prior to the time that he became connected with The Joshua Hendy Iron Works?

A. For several years.

Q. Had he at any time prior to his connection with the Hendy Company been employed by the Bank of California? A. No, he had not.

Q. Now, referring your attention to a date slightly prior to November 4, 1940, the exact date I don't know, perhaps you can supply it, you were approached, were you not, by a representative of MacDonald & Kahn, Inc., with reference to the purchase by that company of the plant of the Hendy Company at Sunnyvale?

A. By Mr. Kahn, on November 4.

Q. November 4, 1940, and Mr. Kahn approached you at the Bank of California, did he?

A. Yes.

Q. What was Mr. Kahn's proposal on that occasion?

A. He asked if the company were for sale, and I told him it was a matter for [480] decision by the board of directors, and he asked me about what I thought it was worth, and I told him if he had any offer to submit that he would have to submit it to the Board of Directors.

Q. On that occasion of November 4, 1940, he did make an offer for the purchase of the plant?

(Testimony of Charles B. Moores.)

A. He made a written offer and a deposit of \$10,000 to bind that offer.

Q. That was the first time that you had been approached by Mr. Kahn with reference to the purchase of the plant, was it?

A. Yes, it was.

Q. Now, after Mr. Kahn had made the offer in writing, and had given you this check for \$10,000—by the way, that check was made payable to the Bank of California, was it not?

A. I believe it was.

Q. You then immediately called a meeting of the board of directors, did you?

A. I called Mr. Bassick and asked him to call a meeting of the board of directors.

Q. A meeting of the board of directors was held on the same day? A. Yes.

Mr. Jordan: May I have the minute book, Mr. Ferguson, please?

Mr. Ferguson: Yes.

Mr. Jordan: Q. Mr. Moores, I am going to show you the minute book of The Joshua Hendy Iron Works, which Mr. Ferguson has just handed me, and call your attention to the minutes of the meeting of the board of directors of that company held on November 9, 1940, at 3:00 o'clock p.m. Will you look at the minutes of that meeting in order to refresh your recollection as to what took place at that time? A. Yes.

(Testimony of Charles B. Moores.)

Q. You recall that meeting, do you?

A. Yes, very well.

Mr. Jordan: I would like to read the minutes of this meeting into the record, and then I would like to interrogate the witness. [481]

The Court: Very well.

Mr. Jordan:

“Minutes of a special meeting of the board of directors of The Joshua Hendy Iron Works.

“A special meeting of the board of directors of The Joshua Hendy Iron Works was held on November 4, 1940, at 3:00 o'clock p.m. at the office of the corporation, Room 702, 206 Sansome street, San Francisco.

“Present were all of the directors, W. R. Bassick, A. J. Mayman, C. B. Moores, Ernest H. Price and A. E. Webber. Also present was the company's attorney—Kenneth Ferguson.

“It was explained to the directors by Mr. C. B. Moores that the meeting was being called to consider an offer to the company by MacDonald & Kahn, Inc. wherein they tendered to The Bank of California, N. A. their check for \$10,000 payable to the bank's order, and authorizing payment of that amount to the company when the bank had obtained from the company an option to them expiring at noon November 15, 1940 for the purchase of the plant and facilities of the company at Sunny-

(Testimony of Charles B. Moores.)

vale, California, clear of all encumbrances except real estate taxes, in form and amount satisfactory to MacDonald & Kahn, Inc.

“Mr. Moores then read to the board a copy of the proposed option to MacDonald & Kahn, Inc., dated November 4, 1940.

“A general discussion of the proposed option took place by the board members, during which it was brought out that there was a good possibility of securing a Navy contract of a substantial amount, which should give the company a good profit if the plant were not to be sold. The discussion also developed the fact that the proposed price would pay all of the company's indebtedness and leave sufficient to pay the owners of beneficial interest in the company's stock approximately \$56 per share, [482] and whatever more could be realized from the sale of the San Francisco property of the company, which was not included in the sale.

“The possibility of the liability of the board members toward creditors and stockholders if the offer were not accepted and later losses reduced the company's capital, was also discussed.

“Mr. Bassick favored raising the price from that offered, but Mr. Moores reported that from his discussion with Mr. Kahn he was firmly of the opinion that they had offered top price, and any further attempt to raise that price might

(Testimony of Charles B. Moores.)

force them to withdraw their offer and search elsewhere for a plant.

“Upon motion duly made by Mr. Moores, and seconded by Mr. Price, it was resolved that,

“Whereas, MacDonald & Kahn, Inc., a corporation, has requested that his corporation, The Joshua Hendy Iron Works, grant to it an exclusive option to purchase the Sunnyvale plant, properties, and business of this corporation at the purchase price and upon the terms and conditions more fully set forth in the form of option agreement hereinafter incorporated in these minutes; which said form of option agreement also more fully describes the properties of this corporation to be covered by said option; and

“Whereas, MacDonald & Kahn, Inc. has delivered to this corporation the sum of \$10,000 in consideration of the granting of said option to 12:00 o'clock M., November 15, 1940 as provided in said option; and

“Whereas, the board of directors of this corporation deems it to be for the best interests of this corporation and its shareholders that said option be granted, and that if said option be exercised the property and assets of this corporation de- [483] scribed therein be sold to the holder and exerciser of said option in consideration of the payment by said purchaser

(Testimony of Charles B. Moores.)

of the purchase price set forth in said option and the assumption of the obligations and liabilities of this corporation in accordance with the terms and conditions set forth in said option;

“Now, therefore, be it resolved that the vice-president and secretary of this corporation be, and they are hereby authorized and empowered for and on behalf of this corporation, and as its corporate act and deed, to execute and deliver said option in the following form.”

The Court: Is it necessary to read that—the option?

Mr. Jordan: Yes.

The Court: I do not believe so.

Mr. Ferguson: I thought we had already covered it by a stipulation.

The Court: I suppose you have a copy of it, haven't you, or you can get one if you want it in evidence.

Mr. Jordan: We can get one. Perhaps it might be advisable to have one made and introduce it. Would you undertake, Mr. Ferguson, to have one made?

Mr. Ferguson: Yes.

Mr. Jordan: Unless you would like to have me read this.

Mr. Ferguson: I will be glad to have it made.

Mr. Jordan: Then immediately following the

(Testimony of Charles B. Moores.)

formal passing of the option, and going on with the resolution:

“Be It Further Resolved, that in the event that the holder of said option shall exercise it in accordance with its terms, that this corporation sell and transfer its properties and assets therein described in accordance with the terms of the option hereby authorized; and [484]

“Be It Further Resolved, that in accordance with the Civil Code of the State of California, the officers of this corporation be, and they are hereby, authorized and directed to take such steps as they may deem necessary or proper to procure the approval of the principal terms of the transaction and the nature and the amount of the consideration by the vote of those persons entitled to exercise a majority of the voting power of the outstanding stock of this corporation; and

“Be It Further Resolved, that upon procuring such approval, and upon the exercise of said option in accordance with its terms, the president or vice-president and the secretary or assistant secretary of this corporation be, and they are hereby, authorized and directed to execute and deliver in the name of and on behalf of this corporation all such deeds, bills of sale, assignments, agreements, and other instruments of transfer as may be deemed necessary or

(Testimony of Charles B. Moores.)

proper to effect such sale pursuant to the exercise of said option, and in general to do any and all acts and things necessary to carry out, perform, and consummate said option and/or sale."

Then follows the directors voting.

"Directors voting Aye were Messrs. Moores, Price, Mayman and Weber. Director voting No, Mr. Bassick. The motion was therefore duly carried and the vice-president and secretary of the corporation executed the above-described option.

"Following there was a general discussion regarding distribution of the shares of the company's stock to the management in accordance with the plan of reorganization. It was decided that such distribution would not be made at this time, pending an exercise of the option, and that such distribution would be considered at some future date. [485]

"There being no further business, on motion duly made and seconded the meeting was adjourned."

Signed, "A. J. Mayman, Secretary."

Mr. Ferguson: Of course, part of these minutes is hearsay.

Mr. Jordan: I thought that I only attempted to read the resolution and the preliminaries leading up to it.

(Testimony of Charles B. Moores.)

Q. Now, regarding a very short portion of that resolution, I read as follows:

“A general discussion of the proposed option took place by the board members, during which it was brought out that there was a good possibility of securing a Navy contract of a substantial amount, which should give the company a good profit if the plant were not sold.”

Do you recall what directors indulged in that discussion?

A. All of them.

Q. Can you state what was stated by the various directors present at the meeting in that connection?

A. I can give you the substance of the remarks, if that is what you want.

Q. To the best of your ability, you may tell us what was said by various directors.

A. Mr. Bassick, was, of course, of the point of view, with the government work that there would be, that was in prospect for the next several years, that the plant was in a position to take some of that work, probably at a profit that would eventually tend toward a reduction of the indebtedness of the company. Those representing the creditors, particularly, and Mr. Webber, representing the stockholders, said that it would be necessary to do a considerable amount of financing to be in a position to take on any of that work—the particular job under discussion which we talked about amounted to a

(Testimony of Charles B. Moores.)

million dollars or [486] more, and The Joshua Hendy Company did not have any million dollars, and did not have any prospect of getting it.

Q. Then it was your feeling at that time, and the feeling of the board of directors who voted in favor of the granting of the option, that the condition of the company was such that it could not establish credit sufficient to carry on the defense work?

A. Well, it might have been able to take on some other piece of the defense work, but the particular job that was under discussion was too large for them under their financial condition to take on.

Q. What was the particular job under discussion?

A. That was the manufacture of torpedo tubes for the Navy Department; I believe that was in prospect; I do not believe it has been started yet; it was rather indefinite, it was an indefinite prospect of work of that nature.

Q. Are you referring now to the conversation that Mr. Hyland had with the Navy Department in Washington? A. Yes.

Q. In the previous September? A. Yes.

Q. As I understand it, then, there was no particular Navy contract that was in sight at that time?

A. No, there was not; there was nothing definite. Mr. Hyland had reported as to the result of his trip; the Navy Department were inquiring as to

(Testimony of Charles B. Moores.)

whether or not the plant of The Joshua Hendy Iron Works could handle that type of work, and it was agreed among all of those who were familiar with the thing that the plant could not handle that type of work.

Q. As a matter of fact, this particular job that we are talking about now was to run in the neighborhood of a million dollars, was it not?

A. Yes.

Q. And it is also a fact, is it not, that shortly subsequent to [487] the sale of the plant to MacDonald & Kahn and the taking over of the plant by the new Joshua Hendy Company, that the Navy Department awarded that company such a contract?

A. I believe that they have.

Mr. Ferguson: Just a moment. That is objected to on the ground that whether or not somebody else got the contract afterward is no criterion whether this corporation could or could not have undertaken it, or would or would not have gotten it.

The Court: The objection is sustained. It is entering into the realm of speculation, too. It is a matter of common knowledge, we all know, that the firm of MacDonald & Kahn might be able to finance a very large contract of that character, and I suppose there is no dispute the Joshua Hendy Company could not do it at that time. MacDonald & Kahn are one of the Six Companies.

Mr. Jordan: That is correct.

Q. Mr. Moores——

(Testimony of Charles B. Moores.)

The Court: Did I understand you to say that no such contract as that has been entered into by the Government?

A. I do not think it was commenced, because the plant that was necessary to carry it on, the construction of it, as I understand it, has not been completed. They built a million dollar plant down there, in addition to the plant.

Mr. Jordan: Q. In that connection, I would like to ask this question, if you know, Mr. Moores: Isn't it a fact that the additions which have been made to the Sunnyvale plant since its acquisition by the new Joshua Hendy Iron Works have been financed by money supplied by the United States Government?

A. Partially.

Q. Mr. Moores, the minutes here indicate that you and Mr. Price, and Mr. Mayman, and Mr. Webber, all voted that the option be [488] granted, and Mr. Bassick voted against it. Have you already in your testimony stated the reasons expressed by Mr. Bassick why he did not feel that the option should be granted?

A. I have already stated the reasons he gave at the time.

Q. In other words, as I understood it, and you correct me if I am wrong, Mr. Bassick felt that by a continuation of the company defense work could be obtained and profit made. Does that summarize it? A. Yes.

(Testimony of Charles B. Moores.)

Mr. Jordan: Mr. Ferguson, I have just shown you a copy of a letter dated November 23, 1940, addressed to the Board of Directors of The Joshua Hendy Iron Works, 206 Sansome street, San Francisco, California, signed by myself, for Byrne, Lamson & Jordan. Can you produce for me the original of that letter?

Mr. Ferguson: I will stipulate that the directors got it on or about the date it bears the first time they had a meeting.

Mr. Jordan: Q. Mr. Moores, I will ask you to look at that letter and read it, if you like. Do you recall having seen that letter before, or having heard it read? A. Yes, I saw it.

Q. It was read at a meeting of the Hendy board of directors shortly subsequent to the date it bears?

A. I am not sure of that; the minutes will show.

Mr. Jordan: I would like to introduce this letter as the next exhibit in order on behalf of plaintiff Shores and Respondents Shores and Behneman.

Mr. Ferguson: It does not relate in any way to the Shores case, does it?

Mr. Jordan: It relates to the Shores case, which is consolidated, here.

Mr. Ferguson: I have no objection.

The Court: It may be admitted. [489]

(The document was marked "Plaintiff's and Respondents' Exhibit 2.")

The Court: We will continue the trial until tomorrow morning at 10:00 o'clock.

(An adjournment was here taken until tomorrow, Wednesday, September 22, 1941, at 10:00 o'clock a.m.) [490]

Wednesday, September 22, 1941—10:00 o'clock A.M.

The Court: You may proceed.

Mr. Ferguson: I believe Mr. Moores was on the stand.

Mr. Jordan: Yes.

CHARLES B. MOORES,
recalled;

Direct Examination
(resumed)

The Witness: I would like to qualify some testimony that I gave yesterday, that is, when I said that the present Joshua Hendy Iron Works was partially financed by government funds. That statement is not correct. According to Mr. Kahn's statement, about three million dollars of their own money will be put in and they will receive half a million dollars from the government as the cost of one particular unit of the plant, in payment of one-sixtieth over a period of five years as the work progresses. They will pay them one-sixtieth of the cost of this plant as a part of the cost of the job, so that they will be reimbursed rather than financed.

(Testimony of Charles B. Moores.)

Mr. Jordan: Q. The statement that you have just made, I take it, Mr. Moores, is information that you obtained from Mr. Kahn?

A. Yes, it is information that I had before my testimony of yesterday, and I wanted to clarify that statement, rather than it be said they were getting government financing.

Q. Then your recollection is better than it was yesterday afternoon.

Your Honor, there was introduced in evidence a letter, which was marked Plaintiff's Exhibit No. 2. I would like to read that letter into the record.

The Court: It may be deemed read, unless there is something [491] you wish to call my attention to.

Mr. Jordan: There is.

The Court: You have already given me the substance of it, haven't you?

Mr. Jordan: Yes. This is a letter which was written by myself to the Board of Directors on November 23, 1940, and which, in substance, questioned the successful rehabilitation of the company, and that we be advised prior to any distribution of the stock, in order that Dr. Behneman might take any steps to protect his interests.

The Court: I understood you to state that in your reference to the letter.

Mr. Jordan: That is correct.

The Court: That may be deemed read.

Mr. Jordan: Q. Mr. Moores, was the letter

(Testimony of Charles B. Moores.)

which I have just referred to as Plaintiff's Exhibit No. 2, ever discussed by the board of directors.

A. It was.

Q. That was shortly subsequent to the date on which it was received, which would have been probably a day or so after November 23? A. Yes.

Q. Will you state what that discussion was?

A. I do not recall exactly, but I know that the consensus of the board was to the effect that they thought that the plan of reorganization had been concluded and that they were under a mandate from the court, under the plan of reorganization, to distribute all of that portion of the stock to someone, that someone being the management of The Joshua Hendy Iron Works.

Q. And that feeling, or that thought of the board, as you have just expressed it, was not communicated in any way to either Dr. Behneman or his counsel?

A. No, not as far as I know, [492] except that they had been notified of the sale of the plant.

Q. The point I am making is that prior to the actual distribution of the stock to Mr. Bassick, Mr. Hyland, and Mr. Levit on December 20 no notification was given Dr. Behneman or his counsel of the intention to distribute the stock?

A. Not as far as I know.

Q. Notwithstanding this letter, and it having been read and discussed in board meeting? A. Yes.

Mr. Jordan: Mr. Ferguson, may I have the min-

(Testimony of Charles B. Moores.)

ute book again? I want to refer again to the board meeting of November 4, 1940, at which it was determined that the option be granted. All of the minutes of this meeting were read into the record yesterday, and I want to call the attention of the witness to a portion of the minutes which reads as follows:

“The discussion also developed the fact that the proposed price would pay all of the company’s indebtedness and leave sufficient to pay the owners of beneficial interest in the company’s stock approximately \$56 per share, and whatever more could be realized from a sale of the San Francisco property of the company which was not included in the sale.”

Now, will you tell us upon what facts or considerations that estimate of \$56 per share was based?

A. It was based on the outstanding stock of 4000 odd shares, and there were certain outstanding obligations—it neglected to take into consideration the Federal and State income tax on the profit on the sale, so that the estimate would have to be adjusted to the amount of the Federal and State tax upon the profit on the sale.

Q. Then, if I understand you correctly, the directors, in estimating the liquidating value of all of the assets of the company, took into consideration the outstanding obligations still payable [493] under the plan, and tax liabilities, to arrive at an

(Testimony of Charles B. Moores.)

estimate of \$56 a share to be paid to the stockholders?

A. They did not take the tax liabilities into consideration, that is the point.

Q. They did not?

A. That was overlooked in arriving at that figure.

Q. All of those other factors, other than the tax liabilities were considered?

A. Yes, other than tax liability.

Q. In arriving at that estimate? A. Yes.

Q. And that estimate did not take into consideration what might be obtained through the sale of the North Beach property?

A. No, it did not.

Q. Now, the language here, "and leave sufficient to pay the owners of beneficial interest",—the only owners of the beneficial interest in outstanding stock of The Hendy Company on the date of this meeting were the holders of the 1907³/₄ shares—in other words, those we have referred to during this trial as 'old stockholders,' isn't that correct?

A. It was the intention in drafting that resolution that there would be 4,000 odd shares outstanding: they were not merely considering the 1907³/₄ shares that were in the hands of the former stockholders that were deposited; they were considering it would also have that effect on the stock that would be distributed pursuant to the plan.

(Testimony of Charles B. Moores.)

The Court: This \$56 a share, who did that relate to?

A. It would be paid to whoever would be holders of the beneficial interest after the issuance of the stock to the management.

Mr. Jordan: Q. Had it been determined by the board on this date, November 4, 1940, at which you discussed the advisability of granting the option to sell the Sunnyvale plant, whether [494] or not this trustee stock of 2212½ shares then held by the board under paragraph 6-G-2 of the plan, was to be distributed to the management?

A. It was always understood it was to be distributed to the management.

Q. You say it was always understood. I am going to read to you a further portion of the minutes of this meeting, which reads as follows. This is the meeting of November 4, 1940:

“Following there was a general discussion regarding distribution of the shares of the company’s stock to the management in accordance with the plan of reorganization. It was decided that such distribution would not be made at this time, pending an exercise of the option and that such distribution would be considered at some future date.”

A. Yes.

Q. Now, I am going to ask you, was the matter of distributing these 2212½ shares of stock held in

(Testimony of Charles B. Moores.)

trust by the voting trustees and directors ever discussed in a board meeting prior to November 4, 1940?

A. I believe it was at various times, yes.

Q. You regularly attended all board meetings during the time that you were a director?

A. I may have missed one or two.

Q. Would you know whether or not any of those discussion with respect to the distribution of this stock was recorded in the minutes of any of the directors meetings which occurred subsequent to March 24, 1936 and up to November 4, 1940?

A. It may appear in the minutes, I don't know that it does.

Mr. Jordan: Will it be stipulated that there is no reference in the minutes of any of the meetings, either of voting trustees, or directors, or stockholders and creditors from March 24, 1936 to November 4, 1940—no recordation of any discussion in the minutes? [495]

Mr. Ferguson: I cannot stipulate, I have not been through the minutes. I do not know if there are or are not.

Mr. Jordan: I can say there is no reference at any time in any of the minutes of any discussion prior to November 4, 1940.

The Witness: There was never any discussion as to who should get the stock, it was merely said when the stock was distributed—the discussions were very informal, all the statements were that the

(Testimony of Charles B. Moores.)

stock at some time would be distributed to certain of the members of the management, but it never was stated as to how many shares they were going to get, or anything of that kind; it never reached that stage.

Q. Now, taking the date March 24, 1936, when this court approved the plan of reorganization and going forward from there, at what point thereafter was it understood or always considered by the board that this stock would be distributed?

A. From the very inception of it.

Q. You mean that your testimony is, as I understand it, that from the time that the plan of reorganization was approved by this court that the board of directors at all times thereafter definitely determined that this stock would be distributed?

A. They determined if it had some value it would be distributed. That was the point, if that is what you are trying to arrive at.

Q. No, I am not trying to arrive at that. I am trying to arrive at the state of mind of the board of directors of this company.

A. It was determined when the company had been sufficiently established, when its financial condition justified it, that they would distribute the stock to the management.

Q. When the financial condition justified it?

A. Yes. That was never defined.

Q. That was never defined?

A. No. [496]

(Testimony of Charles B. Moores.)

Q. Did you consider the phraseology of the plan of reorganization with reference to successful rehabilitation of the company?

A. Certainly.

Q. Did the board of directors, you, yourself, or any other member of the board, to your knowledge, ever make any promise or representation to either Mr. Bassick, Mr. Hyland, or Mr. Levit at any time prior to November 4, 1940, that when the company was in condition to do so that the stock would be distributed?

A. Repeatedly, yes.

Q. Can you tell us under what circumstances such representations were made?

A. Well, it was done at different times, when there was an appeal made for an increase in compensation, it was explained to Mr. Bassick and through him to Mr. Levit and Mr. Hyland, and also directly from me to Mr. Hyland and Mr. Levit, that we realized that they were not properly compensated for their work, they were merely being paid what you would call a retainer; that as the financial condition of the company warranted, they would be increased by periodical payments or interim bonuses, and that some day, if they were successful in the management of the company and placed it in such financial condition as warranted it, that they would then have a half interest in the business, and perhaps some of their other associates.

Q. Let me ask you this: You made this representation personally, did you?

A. Yes.

(Testimony of Charles B. Moores.)

Q. To all three of these gentlemen?

A. Yes.

Q. Was that during board meetings?

A. No, it was not during board meetings.

Q. There was never any formal resolution of the board adopted which held out that prospect to any of those three gentlemen, was there?

A. No, there was not. [497]

Q. Were you ever authorized by the board of directors to make such a representation to Mr. Bassick, Mr. Hyland and Mr. Levit?

A. Yes, because it was understood in the telephone conversations and in the conversations with other members of the board, that that was the plan.

Q. But no formal resolution was ever adopted delegating the authority to you to make such representations? A. No.

Q. As I understand your testimony, it was decided almost immediately following the confirmation of this plan that that stock would some day be distributed to those three men?

A. Under certain conditions it would be, not if the business were abandoned at the end of the five-year period, or any interim period.

The Court: Q. What were the conditions?

A. The conditions were it would not be distributed if it had no value, if it had a value it would be distributed.

Q. You answered the question of Mr. Jordan

(Testimony of Charles B. Moores.)

and said that the stock would be distributed to those gentlemen upon certain conditions.

A. Correct that statement. The conditions were not certain, there was no certainty.

The Court: Will you pursue that examination further?

Mr. Jordan: Q. And you cannot state, then, that there were any definite conditions upon which, in the mind of the board of directors, this stock would be distributed to Mr. Bassick, Mr. Hyland and Mr. Levit?

A. On a satisfactory financial condition of the company—what would be satisfactory had not been determined.

Q. There was no determination that the condition of the company was satisfactory to the extent of permitting the distribution of this stock until December 4, 1940, was there? [498]

A. Well, it had not been discussed in the month of December, 1939, after the figures for 1939 were available—until that time that is true, it had not been discussed as to whether there would be any distribution.

Q. In other words, the first discussion in reference to the company having reached a financial condition where it would be appropriate under the plan of reorganization to distribute this stock took place on December 20, 1940?

A. No, there were informal discussions among the directors, not at a meeting, perhaps, or perhaps

(Testimony of Charles B. Moores.)

there were—it was discussed at the meetings and at other times informally that the company was now in a position where the stock was beginning to have some value, and it was the time to consider when we were to distribute it, and we said that as long as the five-year period had lapsed in March, 1941, that that would complete the trial term, as outlined by the court originally, that was as good *as* a time as any to make the distribution, unless there was some trouble started in in the affairs of the company that made it unwise to distribute the stock.

Q. When, to the best of your recollection, was the first informal discussion upon that subject?

A. That was along in March or April, 1940.

Q. March or April, 1940? A. Yes.

The Court: I understand from you, Mr. Moores, it was understood from the beginning of the reorganization proceedings that this stock should be distributed to the managing officers?

A. When the financial condition of the company was satisfactory.

Q. When the financial condition justified it?

A. Yes.

Q. Now, was that discussed with these men before the filing of the plan of reorganization?

A. It was discussed in the [499] plan, itself, before the reorganization. I don't know that we did with any of them at that time except Mr. Bassick, but I know that we did with him, because before we adopted the plan Mr. Bassick was the one who

(Testimony of Charles B. Moores.)

had the provision placed in the plan, or it was at his insistence that it was placed in the plan, that the creditors would reduce the amount of indebtedness by 10 per cent. on the secured and 15 per cent. on the unsecured indebtedness, so that the job would not be so hopeless from the management point of view.

Mr. Jordan: Q. As I understand it, Mr. Moores, then, practically from the inception of this plan of reorganization, or even during the time it was being formulated, and before it was approved, the intent was that this stock would be distributed to the management?

A. I presume that is what the plan intended.

Q. From the time that the board of directors, which was elected, or rather nominated, pursuant to paragraph 7 of the plan, came into being, on April 8, 1936, it was the feeling and intent of the entire board that distribution of this stock would be made at a future date?

A. You say in 1937?

Q. In 1936, when you first went on the board.

A. Yes.

The Court: You signed for the Bank of California the proposed plan of reorganization, did you not? A. Yes, I did.

Q. Which contained the very provision we are now discussing? A. Yes.

Mr. Jordan: Q. And having determined, Mr. Moores, that this stock would be distributed in the

(Testimony of Charles B. Moores.)

future upon certain conditions, it is my understanding of your testimony that those conditions were not very well defined?

A. No, they were not.

Q. You cannot tell us to-day what they were?

A. No.

Q. You made the remark a moment ago "when the condition of the [500] company warranted it." Now, was there any standard established or adopted by the board of directors of the company conditions which, if reached, would bring about a distribution of the stock? A. No, there never was.

Q. There never was? A. No.

Q. It is a fact, is it not, that the first time when a resolution was adopted by the board of directors of the Hendy Company in which it was declared and determined, according to the board, that the affairs of this company had been successfully rehabilitated was on December 20, 1940?

A. That is true.

Q. And it is also true, is it not, that the sale of the plant had been consummated something over a month prior to the date of that meeting?

Mr. Ferguson: I object to that as calling for a legal conclusion.

Mr. Jordan: I believe the stipulation was that the sale was consummated on the 15th of November.

Mr. Ferguson: I did not stipulate to that. I said that the option was exercised on the 15th and the title passed, but I refused to stipulate as to the legal

(Testimony of Charles B. Moores.)

conclusion of when the sale was actually consummated. I think that is a legal conclusion.

Mr. Jordan: I think the stipulation was, Mr. Ferguson, that the Hendy Company received a total of \$426,000, which represented the consideration for the sale of that property, before the end of November, 1940.

Mr. Ferguson: There is no question about that, but you have just asked the witness when the sale was consummated, and that question calls for a legal conclusion.

Mr. Jordan: I was merely desirous of calling the Court's attention to the date, and to the fact for the first time that [501] there was a determination of successful rehabilitation was on December 20, which was over a month after the company had practically gone out of business.

Q. Mr. Moores, you have been fully familiar with the general financial condition of the Hendy Company, have you not, from the time that you first went on the board in 1936, right through to the present time? A. I believe so.

Q. It is true, is it not, that the Bank of California had loaned the Hendy Company very considerable sums of money for a period of approximately fifteen or twenty years before the company went into reorganization in this court?

A. It had.

Q. In other words, the bank had been a substantial creditor, both secured and unsecured, of the

(Testimony of Charles B. Moores.)

Hendy Company during the period from and including the first World War period right through to the time when the bank finally received this money in November or December, 1940?

A. A considerable time prior to that, too.

Q. Prior to the first World War? A. Yes.

Q. At all times during that period, then, the bank had been a substantial creditor of the Hendy Company?

A. Since 1907, as far as I know.

Mr. Jordan: I believe it was stipulated yesterday, was it not, Mr. Ferguson, that the Bank of California, at the time this plan was adopted, held 90 per cent., or better, of the secured claims against the Hendy Company?

Mr. Ferguson: If it was not stipulated it was a fact.

Mr. Jordan: It was a fact?

Mr. Ferguson: Yes.

Mr. Jordan: I think you also said that the bank held about 85 per cent. of the unsecured claims at the time the plan was approved? [502]

Mr. Ferguson: That is approximately correct.

Mr. Jordan: Q. Do you know of your own knowledge how much the bank had coming from the Hendy Company at the time that the sale of the plant was consummated in November, last year?

A. I do not have the figures, without reference to the books.

(Testimony of Charles B. Moores.)

Q. Have you an approximate idea of about how much that amounted to?

Mr. Ferguson: The books are the best evidence.

Mr. Jordan: I think that Mr. Moores' sworn answer to our interrogatories is perhaps a good answer.

Q. By the way, Mr. Moores, you recall, do you not, swearing to certain answers made by yourself and the other defendants in this matter?

Mr. Ferguson: I will stipulate to the answers, Mr. Jordan.

Mr. Jordan: Answer 3 to Interrogatory 3 shows that the principal amount of unsecured obligations remaining unpaid on the 15th of November, 1940, was \$143,522.96. You recall that figure generally, Mr. Moores? A. Yes, that is approximately.

The Court: Unsecured claims?

Mr. Jordan: That was the total of unsecured claims which had been deferred under the plan, and were unpaid on November 15. Answer No. 4 to Interrogatory No. 4 indicates that the principal amount of the secured obligations remaining unpaid as of November 15, 1940, were \$131,443.61.

Mr. Ferguson: That is correct.

Mr. Jordan: And will it be stipulated, Mr. Ferguson, that the Bank of California held substantially all of the claims totaling those two amounts?

Mr. Ferguson: No, that is not correct. As to of them as of November 15, [503] 1940; the other

(Testimony of Charles B. Moores.)

secured creditors, only few in number had been paid. As to the unsecured claims, there were other creditors in a substantial amount.

Mr. Jordan: In any event, the Bank of California had coming on November 15, 1940 from the Hendy Company very considerable in excess of or approximately \$300,000, did it not?

Mr. Ferguson: Oh, no, I think that was the total obligations, principal and interest.

Mr. Jordan: In excess of \$250,000. The total was \$274,000.

Mr. Ferguson: If you make it \$200,000 I will stipulate to it.

Mr. Jordan: Will you stipulate it was in excess of \$200,000?

Mr. Ferguson: Yes, I believe it was.

Mr. Jordan: Q. When the bank received its payment, either in November or December, 1940, of this amount that was owing at that time, which Mr. Ferguson has stipulated was in excess of \$200,000, that was the first time since 1907 that the Bank of California had ceased to be a creditor of the Hendy Company. Is that correct?

A. That is correct.

Q. Mr. Moores, had the Bank of California loaned the Hendy Company any money subsequent to the consummation of the plan on March 24, 1936?

A. Yes, it had.

Q. Do you know of your own knowledge the amount of those loans?

(Testimony of Charles B. Moores.)

A. They were granted an aggregate of \$250,000; I don't know whether it was all used up to \$250,000 or used up to \$225,000.

Q. Then, in addition to being a deferred creditor under the plan, the Bank of California continuously during that period following the consummation of the plan, and up to the time of sale of the plant was a very substantial creditor of this company? [504]

A. Not continuously, no.

Q. Well, periodically. A. Periodically, yes.

Q. Was the bank a creditor of the Hendy Company under this new loan arrangement which went into effect after the plan was confirmed, at the time the plant was sold?

A. No, I do not believe it was.

Q. As a matter of fact, the Hendy Company did not borrow any money from any other institution or individual from the time that the plan was confirmed up to the date of the sale of the plant, did it?

A. No, it did not, except in the normal course of business, they established credit for supplies, and that sort of thing.

Q. They did not borrow any working capital from anyone, or actually make a loan with anyone other than with the Bank of California?

A. No.

Q. I think you testified a while ago that you were fully familiar with the financial condition of

(Testimony of Charles B. Moores.)

this company during the entire time that you were on the board? A. Yes.

Q. And, of course, you are familiar with the condition of that company on November 15, 1940?

A. Yes.

Q. Now, from your knowledge of the condition of the Hendy Company on that date, which was prior to the actual sale of the plant at Sunnyvale, and prior to the receipt of the \$426,000 consideration, was that company in a condition, financially, to declare and pay additional compensation or bonuses to officers and employees in the amount of approximately \$103,000?

Mr. Ferguson: We object to that on the ground it calls for the conclusion of the witness on a matter on which it is not the best evidence.

The Court: If you know you may answer.

A. I do not recall if that is a fact, if the money had not been [505] paid until November 15.

Mr. Jordan: Q. I am going to ask you the same question, directing it from the standpoint of time to a time immediately prior to the consummation of the sale of the plant, and immediately prior to the receipt of this consideration of \$426,000, was this company financially in a condition at that time to declare and pay bonuses to its officers and employees of \$103,000?

A. I would have to refer to the records for that, but as of that particular date I do not recall off-hand.

(Testimony of Charles B. Moores.)

The Court: Have you that, Mr. Ferguson?

Mr. Ferguson: I have the figures there of September 30, but the question involves a conclusion as to whether there were current assets over \$103,000.

Mr. Jordan: I do not think that is asking anything unfair of this witness.

The Court: If he does not know you cannot ask him.

Mr. Jordan: Q. Let me ask you this, Mr. Moores, in view of your knowledge of the condition of the Hendy Company immediately prior to the sale of the Sunnyvale plant and receipt of proceeds of sale by the company, was the company in a financial condition at that time to pay off in full the then remaining unpaid deferred obligations under the plan of reorganization, which admittedly amounted to \$274,966.57?

A. Not by payment of cash on hand, if that is what you mean.

Q. That is exactly what I mean. This \$274,966.57 would have become fully payable on March 24, 1941, would it not, under the plan?

A. With the privilege of renewal under certain circumstances.

Q. Is there anything in the plan which would bind any creditor of this company to extend beyond five years the maturity of [506] his claim?

A. The plan is there, you can read it. I believe it does.

(Testimony of Charles B. Moores.)

Mr. Ferguson: The plan provides that unsecured notes are renewable at the end of five years.

Mr. Jordan: Does that mean that the company could authorize the extension of time? The unsecured notes on November 15, 1940 totaled \$143,000.

Mr. Ferguson: \$143,000, to which must be added interest.

Mr. Jordan: The amount of unsecured obligations payable on November 15, 1940 was \$143,522.96.

Mr. Ferguson: That is right.

Mr. Jordan: And the principal amount of the secured obligations on that date was \$131,443.61.

Mr. Ferguson: That is correct. The plan provides as to unsecured notes and accounts, "Such notes shall bear no interest at all for the first three years, and interest thereafter at the rate of 5 per cent. per annum, payable only if earned, and payable then only upon maturity; with the privilege to the debtor corporation, at maturity, to renew said notes for their face value, plus accumulated interest, such renewal notes to bear interest at 5 per cent. per annum, and be payable in five annual installments of 20 per cent. each." So there was in the plan certainly the privilege of renewal of those notes.

Mr. Jordan: Those are unsecured notes. Is there any similar provision so far as secured notes are concerned?

A. The plan speaks for itself, I think it is in the plan.

Mr. Jordan: I do not recall.

(Testimony of Charles B. Moores.)

Mr. Ferguson: It is at the top of page 6, under 3-C class notes. "If, upon the five-year due date of said note, the property [507] shall not yet have been sold, and the taxes thereon have been paid, the debtor corporation may renew said note for a further period of five years, such renewal note to bear interest at 5 per cent. per annum.

The Court: What page are you reading from?

Mr. Ferguson: That is at the top of page 6 in Class C notes.

Mr. Jordan: Q. I think you can answer this question: In order to pay the approximate \$103,000 of additional compensation which was declared and paid on December 4, 1940, and to pay the unpaid deferred obligations of \$274,966, which were paid admittedly sometime subsequent to the receipt by the company of the proceeds of the plant, it was necessary to resort to the proceeds of the sale of the plant, was it not? A. Yes, certainly.

Q. And, putting it in another way, the company could not have paid every one of those items if it had not been for the sale of the plant, could it?

Mr. Ferguson: You mean it did not have sufficient cash?

Mr. Jordan: Yes.

Mr. Ferguson: If that is what the question is, all right.

A. It did not have sufficient cash. They might have been able to refinance or do something else and accomplish the same thing.

(Testimony of Charles B. Moores.)

Mr. Jordan: Q. Now, from March 15, I think it is, 1937, to March, 1941, the Bank of California had a representation of three directors on the Hendy board, had it not, namely, yourself, Mr. Mayman and Mr. Bassick?

A. They were entitled to three yes.

Q. They had three continuously during that period?

A. Mr. Bassick was elected to take the place of Mr. Mills, who represented the bank.

Q. Mr. Moores, can you estimate at this time the approximate [508] amount that will be available for distribution in the form of further liquidating dividends of this company?

A. Off-hand, the only asset of any moment is a lot at North Beach that has been for sale since 1906 and still is for sale.

Q. With the exception of the additional compensation, and the deferred claims under the plan, and the \$85,000, roughly, those are all rough figures, declared and paid in the form of first liquidating dividends which total something over \$462,000, and those payments all made in either November or December, 1940, do you recall any other substantial disbursements of money by the Hendy Company during those months?

A. I do not.

Q. Have you any way of determining what the potentialities are with respect to the sale of that

(Testimony of Charles B. Moores.)

North Beach property, what you think you could get for it?

A. The Board of Directors has authorized the sale at \$1 a square foot, which I think, as there are 37,812 feet in the property, would be approximately \$37,000.

Q. And to that would be added the proceeds of liquidating any other assets the company has?

A. Accounts receivable, maybe a thousand dollars additional.

Q. Do I understand, then, that in the main, \$37,000 is about the maximum amount that could be expected to be distributed as further liquidating dividends of the Hendy Company?

A. No, I imagine if that lot were sold for \$37,000 there would be about \$45,000 to distribute.

Q. About \$45,000? A. Yes.

Q. That would be after payment of all tax liabilities?

A. They have not yet been determined finally, I have not the figures.

Q. But that is your estimate, that \$45,000 will be available for [509] distribution as liquidating dividends? A. Approximately.

Q. As a member of the present board of directors, I presume that it is the intent of that board, is it not, when the time comes to make a distribution of further liquidating dividends, to declare those dividends on the entire outstanding 4120 $\frac{1}{4}$ shares?

(Testimony of Charles B. Moores.)

A. I think there is some agreement not to make it.

Mr. Ferguson: We came in before Judge Wyman and agreed with Mr. Jordan that that would not be done until this litigation was over.

Mr. Jordan: I appreciate that, Mr. Ferguson. I am not thinking for one moment you are going to make any distribution until this litigation is determined.

Mr. Ferguson: That was merely by way of explanation.

Mr. Jordan: Q. My question was this, when the time comes to properly distribute further liquidating dividends, is it or is it not the intention of the board of directors to distribute those dividends across the board on all of the 4120 $\frac{1}{4}$ shares?

A. Yes.

Q. That would mean that Mr. Bassick, Mr. Hyland, and Mr. Levit would share pro rata?

A. An equal distribution.

Q. That is, you intend to do that unless this Court should see fit to restrain you?

A. Yes, or some other court.

Q. Mr. Moores, I am going to again refer you to the answers to the interrogatories of Behneman and Shores, sworn to by you on the 23rd of July, 1941. I call your attention to Answer 15, appearing on page 11 of the Answers—I am going to show you the original of your sworn answer, Mr. Moores,

(Testimony of Charles B. Moores.)

and ask you to look at the answer to No. 15, there, which contains a table of figures. A. Yes.

Q. You recall those, do you? A. Yes. [510]

Mr. Jordan: I am going to use my copy so that the Court may have before him the original. Do you have an available copy, Mr. Ferguson?

Mr. Ferguson: Yes, I have.

Mr. Jordan: May we ask you to produce the 1940 report prepared for the Hendy Realization Company by John F. Forbes, a certified public accountant.

Mr. Ferguson: Yes.

Mr. Jordan: I am going to direct your attention to a report of examination of accounts for the year ending December 31, 1940, apparently prepared for Hendy Realization Company by John F. Forbes & Co., certified public accountants, and ask you to look at that report, Mr. Moores.

Mr. Ferguson: Is there a question pending?

Mr. Jordan: There is not. I am only laying a preliminary foundation. Mr. Ferguson, will you stipulate that John F. Forbes & Co. is a firm of certified public accountants?

Mr. Ferguson: Yes.

Mr. Jordan: Q. Do you recall that statement, Mr. Moores? A. Yes.

Q. Do you recall having seen it before?

A. Yes.

Q. Now, I would like to ask you if this statement which you have just examined was ordered

(Testimony of Charles B. Moores.)

prepared by the board of directors by John F. Forbes & Co., certified public accountants?

A. They have been the accountants for the firm for several years and in the normal course of business they would prepare that statement, and they were asked to prepare this one.

Q. They were specifically requested by the board of directors of The Joshua Hendy Company?

A. Yes.

Q. And in due course, after the report was completed I take it [511] it was sent to the Board of Directors by the accountants?

A. I think it was available for the annual meeting in March.

Q. That would have been the annual stockholders meeting?

A. It is dated March 24, 1941, I believe.

Q. That is after the date of the annual meeting, which was on the 17th of March?

A. I guess very likely it was not available. I was under the impression it was available.

Q. In any event, will you say that was received sometime shortly after March 24, 1941?

A. Yes, I presume it was.

Q. It was accepted by the board of directors of the company, was it?

A. I am not sure that the board had a meeting since that date, have they?

Mr. Ferguson: I do not think they have.

Mr. Jordan: There was or was not?

(Testimony of Charles B. Moores.)

Mr. Ferguson: I do not think there was any formal acceptance of the report.

Mr. Jordan: Was there any formal acceptance?

Mr. Ferguson: Not that I know of.

Mr. Jordan: Q. Let me ask you this, Mr. Moores: When this report was received by the company did the company ever act upon it?

Mr. Ferguson: I object to that, if your Honor please, as calling for the conclusion of the witness.

The Court: Sustained.

Mr. Jordan: I would like to introduce this report, your Honor, as Plaintiff's exhibit next in order, which I believe will be No. 3.

Mr. Ferguson: To which I object, if your Honor please, on the ground that no proper foundation has been laid. It is simply a summary or in the nature of a check upon the books of the [512] corporation. The actual evidence is what the books show.

The Court: You have here a report of a public accountant. That report was made from the books of the company.

Mr. Jordan: That is it, your Honor, and it represents their entire report and summarization as to the condition of affairs of the company during the year. It is said that they have been their accountants for years.

Mr. Ferguson: That is true, but, nevertheless, this is not in any respect binding on the company. As to the figures shown, there is no question but what this report is correct, but I submit that is not

(Testimony of Charles B. Moores.)

the proper way to prove financial ability or condition of the company.

The Court: Are you going to offer it?

Mr. Jordan: I am going to offer it.

The Court: If you are going to insist on your objection it may lead to a reference of this matter to an accountant.

Mr. Ferguson: I would like to have it tried here, but I am apprehensive in so doing, that he is going to ask what his opinion is, and we are not going to have a true picture before the Court.

The Court: He is not asking what this witness' opinion is. As I understand it the report has been produced here, a report of a public accountant, of this company, and this report is made after an examination of the books of the company. Now, I take it that it reflects truly the condition of those books.

Mr. Ferguson: That is true.

The Court: It seems to me that it should be admitted here in evidence without any objection, and without requiring the court to continue this case for the purpose of having another examination made of the books of the company, for the purpose of [513] securing another report which would prove only the same thing as this one did.

Mr. Ferguson: In the light of your Honor's remarks I will withdraw my objection, but may it be understood that we do not stipulate to any conclusions. The figures are correct, but any conclu-

(Testimony of Charles B. Moores.)

sions that may be drawn in there are excluded.

The Court: If there are any conclusions in the report that you would want to explain you may.

Mr. Ferguson: That is right. The point is I did not want to stipulate to the report and be denied the right to explain anything that is in the report.

The Court: You have a right to explain anything that is in the report.

Mr. Ferguson: Thank you.

(The report was marked "Plaintiff and Respondents' Exhibit 3.")

Mr. Jordan: Mr. Ferguson, will you please produce the similar annual report of the Hendy Company for the years 1936, 1937, 1938, and 1939?

Mr. Ferguson: In order that we may have a complete picture, I will produce a report for the fifteen months' period from April 1, 1935, to June 30, 1936; another report for the period six months later, ending December 31, 1936; another report for the year ending December 31, 1937; another for the year ending December 31, 1938; another for the year ending December 31, 1939, and 1940 you have already; and I also have a report for the ten and a half months period ending November 15, 1940. I hand you all of those. I think they give a full picture.

Mr. Jordan: I am sure they will.

Mr. Ferguson: It will be stipulated that all of these re- [514] ports were prepared by John F. Forbes & Co. for the Joshua Hendy Iron Works,

(Testimony of Charles B. Moores.)

subject to my explanation with respect to the one that was introduced.

The Court: You are bound by no conclusion stated in the reports, except it is stipulated that the figures contained in them are correct, and if there are any conclusions in them you wish to explain you may do so. They can be marked Exhibits 3-A, 3-B, 3-C, 3-D, 3-E and 3-F.

Mr. Jordan: For the purpose of the record I had better identify them.

The Court: Yes.

Mr. Jordan: I take it that Exhibit 3 will be the 1940 report, being the one first offered. 3-A will be the report of Forbes & Co. dated August 4, 1936, and for the period of fifteen months from April 1, 1935 to June 30, 1936. I will offer that.

I will offer as 3-B the Forbes & Co. report dated April 1, 1937, covering the period of six months ending December 31, 1936.

I offer as 3-C the fourth report, dated February 24, 1938, for the year period ending December 31, 1937.

I will offer as 3-D the fourth report for the year period ending December 31, 1938.

I will offer as 3-E the Forbes report for the year ending December 31, 1939.

I will offer as 3-F the fourth report for a period of ten and a half months ending November 15, 1940.

(The documents were marked, respectively, Plaintiff and Respondents' Exhibits 3-A to 3-F, inclusive.)

(Testimony of Charles B. Moores.)

Mr. Ferguson: Now, Mr. Jordan, I have this addition and [515] offer it to you, it may be of assistance, November 15, 1940—November 15 to December 31, 1940, with sheets of summaries.

Mr. Jordan: May I make this suggestion, that you permit me to examine these during the recess, and if I consider them pertinent I will offer them, and if not you may offer them during your case.

Mr. Ferguson: That is all right. I thought we might complete the picture at one time.

Mr. Jordan: Q. Now, Mr. Moores, directing your attention again to Answer 15 in your sworn answers, appearing on page 15—first, I would like to ask you if you prepared these figures, yourself.

A. No, I did not.

Q. You did not? A. No.

Q. I assume they were prepared for you by your accountant, John F. Forbes & Co.?

A. They were.

Q. Did you instruct Forbes & Co. to prepare this particular portion of your answer?

A. I turned over the interrogatories to them, as I recall it, and asked them to get up whatever account at that time was required, and submitted them to Mr. Ferguson, and he went over them, and then the answer was drawn by him and I signed it.

Q. Then you left the preparation of this table appearing in Answer 15 to the accountants?

A. Yes.

(Testimony of Charles B. Moores.)

Q. Have you any personal knowledge about the figures appearing, at all?

A. Except that they compare by comparison with the statements for those years—I made the comparison, not the net results.

Q. Let me ask you this: Did you, when you received this prepared table, and before you verified the answers, compare the items listed under 1940 as net profit from operations against the 1940 [516] Forbes statement? A. Yes.

Q. You did? A. Yes.

Q. Against the 1940 Forbes statement?

A. Yes.

Mr. Jordan: May I have the 1940 statement, please? Now, the figure which appears in the first line, there, of the table after the designation “Net profit from operations,” in 1940 is \$47,501.77. I am going to ask you to take the Forbes statement and point out where that figure appears, if it does.

Mr. Ferguson: I can save you time if you want.

A. Here it is.

Mr. Jordan: What page is that?

Mr. Ferguson: Exhibit B, page 1.

Mr. Jordan: Q. Now, that figure of \$47,501.77 is given as net profit from operations for 1940 before any income charges are taken into consideration, is it not? A. Yes.

The Court: What are the income charges?

Mr. Jordan: For one, the additional compensa-

(Testimony of Charles B. Moores.)

toin paid of \$102,729.76, which must necessarily be deducted from this net profit from operations.

Mr. Ferguson: If your Honor please, there is just one other point we want to point out, the accountants, here, in auditing these items, have made an income charge for the year of the entire amount of the bonus, so-called, the cash distribution that was made to employees of \$102,729. Now, they did that because they had to put it somewhere. This is only a one-year audit. The fact is that that \$102,000 is, as shown by the resolution, in payment for all of the services for a period of five years, and should have been allocated over the five years, but merely making an audit they attached it to this one year. It should have been allocated over the five years; it having been [517] paid for services for five years, it is improper to charge it in one year, although the payment was made. You cannot charge against earnings for one year a bonus paid for services during five years.

Mr. Jordan: If your Honor please, the only figure in that column which we are questioning is that which refers to net profit from operations. The others have been checked by our accountants, but this figure of \$47,501.77 does not seem to be borne out by their own figures. In other words, it does not truly reflect what actually happened to the company. They did not make a profit of that amount, but they actually wound up with a loss, as shown by

(Testimony of Charles B. Moores.)

their own statement. I will refer you, Mr. Ferguson, to Exhibit B, page 2 of this report, and I will show it to Mr. Moores. Under the heading of "Net loss" it shows \$80,690.43.

Mr. Ferguson: Then there are additional items that show a surplus of \$79,000, and they show the process by which they arrived at each successive figure. You could take that figure out anywhere there and misinterpret it.

Mr. Jordan: Do you expect to have the gentleman here who prepared these reports, Mr. Ferguson?

Mr. Ferguson: That is a problem, the man who actually prepared the reports is not here. If we cannot get him we will have one of his assistants who worked on the reports.

Mr. Jordan: I am not going to pursue the questioning on this line any further, your Honor. You will have somebody here who will be able to explain it?

Mr. Ferguson: We expect to, yes.

Mr. Jordan: Q. Mr. Moores, as a director of the Hendy Company, you naturally had considerable contact with Mr. Bassick [518] during the last three years? A. Yes.

Q. You saw him quite frequently? A. Yes.

Q. He was in poor health during practically all of 1940, was he not? Yes, he was.

Q. To the extent that there would be long periods of time during which he would not be able to come to the office?

(Testimony of Charles B. Moores.)

A. No. It seemed like a miracle that he was there, but he was there.

The Court: What was he suffering from, Mr. Moores, do you know?

A. I don't know exactly, your Honor, he was a Christian Scientist and they won't admit anything wrong.

Mr. Jordan: Q. As a director of the company, Mr. Moores, did you feel, in November, 1940, prior to the sale of the plant, that the business of the Hendy Company could not be successfully and profitably conducted after November 4?

A. Did I feel it could not be?

Q. Yes. A. No.

Q. You felt that it could be conducted profitably?

A. Yes, sure, subject to the usual hazards of business.

Q. The Bank of California was a stockholder of the Hendy Company at the time that the plant was sold in November of last year, was it not?

A. The Bank was the actual owner, but the stock was in the name of a nominee.

Q. Do you recall the total number of shares that were owned by the bank immediately prior to the sale? A. 400.

Q. Do you know when the bank acquired those shares?

A. It acquired them by way of pledge sometime prior to 1923.

(Testimony of Charles B. Moores.)

Q. By way of what?

A. By way of pledge, as security for a note.

Q. It was a note executed by Mary F. McGurn?

A. Yes. [519]

Q. Mary F. McGurn died sometime prior to June, 1920, did she not? A. Yes.

Q. And on or about June 1, 1920 the Bank of California filed a claim against her estate for \$16,-717.09, is that correct? A. Approximately.

Q. That claim was secured at that time by what?

A. 500 shares of the Joshua Hendy Iron Works.

Q. 861½ shares, was it not?

A. No, the claim was secured by 500 shares. There were 861½ shares in the Estate of Mary McGurn, and there was an exchange for 430¼ shares at the time of the deposit, and that is when we learned there was additional stock, when we surrendered her 500 shares for the voting trust certificates. We found that there was an additional holding, but it was not pledged.

Q. But you only had a pledge lien on the McGurn shares through all of those years up to September of 1940, is that correct?

A. No, we had a pledge—you mean up to the time of her death; then we had a claim against her estate. The pledge lien up to 1920 was against 500 shares of stock.

Q. In any event, you were not paid on your claim against the Estate of Mary F. McGurn at any time, were you, in cash? A. No.

(Testimony of Charles B. Moores.)

Q. You received, in fact, nothing of any kind in payment of that claim until——

A. June, 1940.

Q. When?

A. When we got the liquidating dividend on the stock.

Q. I am trying to locate the claim here, but I think you received satisfaction of that claim on September 20, 1940, do you recall that?

A. It may have been.

Q. As a result of a compromise between the bank and Mr. Charles C. Gardner, who is the heir of Mary F. McGurn the bank acquired [520] 430³/₄ shares, did it not? A. Yes.

Q. Of the stock of the Hendy Company?

A. Yes.

Q. And in consideration of the receipt of those shares extinguished the old indebtedness and claim against the estate of Mary F. McGurn?

A. That was the only assets of the estate, other than a lot down in South San Francisco, which we did not consider had any value.

Q. So that it was only on or shortly after September 20, 1940, that the Bank of California became the legal owner of any shares of stock in the Hendy Company?

A. They actually owned the stock as of that date, yes.

Q. And the stock was then transferred to the bank's name on the books of the corporation?

(Testimony of Charles B. Moores.)

A. To the Fresno Land Company.

Q. As assignee for the Bank of California?

A. No; they were the nominees.

Q. That was sometime shortly after September 20, 1940? A. Yes.

Mr. Jordan: I think that is all.

Mr. Ferguson: That is all.

Mr. Jordan: By the way, Mr. Ferguson, have you been able to locate Mr. Bassick since yesterday?

Mr. Ferguson: No.

Mr. Jordan: You have not any idea to-day where he could be located?

Mr. Ferguson: No. [521]

ROBERT M. GANE,

Called for the Plaintiff; Sworn.

Mr. Jordan: Q. Mr. Gane, you are a certified public accountant? A. I am.

Q. How long have you been engaged in the practice of accounting?

A. In public practice about seventeen years.

Q. Are you associated with any firm of accountants?

A. I am with F. W. Lafrentz & Co.

Q. Where are the offices of your firm located in San Francisco?

A. In San Francisco in the Mills Building.

Q. What is your firm name?

(Testimony of Robert M. Gane.)

A. F. W. Lafrentz & Co.

Q. Does the firm of F. W. Lafrentz & Co. have offices elsewhere than in San Francisco?

A. Yes. We have about fifteen offices in principal cities throughout the United States, such as New York, Chicago, Washington, D. C., Cleveland, and so on.

Q. You are a partner in that firm, are you?

A. I am.

Q. Where did you receive your professional training, and what degrees do you hold?

A. I have a degree of Certified Public Accountant, or C. P. A., and received that as a result of State examination in California.

Q. Are you at the present time connected with any school of accounting, and if so, for how long?

A. Yes, for about twelve years I have been President of the San Francisco Institute of Accounting; that is a non-private school of collegiate grade.

Q. Are you a member of any professional associations or societies?

A. Yes, I am a member of the American Institute of Accountants, the National Association of Cost Accountants, and the California State Society of Certified Public Accountants, Past President of the San Francisco Chapter.

Q. Have you had an opportunity to examine the financial [522] report prepared by John F. Forbes & Company, Certified Public Accountants, for

(Testimony of Robert M. Gane.)

Hendy Realization Company, formerly known as Joshua Hendy Iron Works, for the years 1936 to 1940, inclusive? A. Yes.

Q. I might say for your information, Mr. Gane, those reports have been introduced in evidence here as Plaintiff's Exhibits 3, 3-A to F, inclusive. When and at whose request did you examine those reports, Mr. Gane?

A. In May or June of this year, at your request.

Q. Those reports are purportedly based upon and contain figures taken from the books and records of the Hendy Realization Company.

Mr. Ferguson: One moment, it calls for a conclusion of the witness. He cannot possibly know what they contain.

Mr. Jordan: I said "purportedly."

The Court: Do you deny it?

Mr. Ferguson: No, I don't know what he has examined, if the Court please.

The Court: He says he examined the Forbes reports.

Mr. Jordan: Q. I will hand the witness Plaintiff's Exhibits 3 and 3-A to 3-F, inclusive, and ask you to look at them carefully. These are the reports which I furnished you and which you examined in the spring of this year.

A. There are two reports here which I did not have for examination, but the others are the reports that I examined, or copies of them.

(Testimony of Robert M. Gane.)

Q. Can you identify for us the two reports by exhibit number that you did not examine?

A. The reports marked 3-A and 3-F are the two that I did not examine.

Q. Would you say what the period covered by 3-A is?

A. 3-A covers the period from April 1, 1935 to June 30, 1936.

Q. And 3-F covers what?

A. 3-F covers the ten and one-half [523] months period ending November 15, 1940.

Q. But your examination did include an examination of the reports for the entire year of 1940?

A. It did.

Q. Mr. Gane, in testifying at this time regarding your finding and the result from your examination of these various reports that you have just identified, you have assumed, have you not, that all of the figures and other data that are contained in these reports purportedly reflect the company's affairs and records?

A. Yes, I have confidence in the accountants who prepared these reports, and while not accurate there are certain minor adjustments—I should say while there are certain minor adjustments reflected in the reports from period to period in the aggregate they would reflect that condition.

Q. You made your examination upon that assumption?

A. Yes.

(Testimony of Robert M. Gane.)

Q. For what purpose did you examine these various annual reports of the Hendy Company?

A. For the purpose of gauging the result of the operations throughout the period and comparing the financial condition at various times.

Q. When you refer to the period you refer to what period?

A. The entire period of, close to five years that they covered.

Q. And that would be from March 24, 1936 to the end of December, 1940?

A. That is correct.

Q. Did you at the time of your examination of these reports take any notes or make a memorandum or summary of the material contained in them?

A. I made various notes and a summarization from the reports.

Q. Have you those notes and summarization with you? A. I have.

Q. I am about to ask you some questions and before I do so I want to ask you to please restrict your testimony as much as possible to ultimate findings and avoid any unnecessary delay. [524]

Mr. Ferguson: If your Honor please, preliminarily I would like to ask what the purpose of this line of inquiry is, what it is intended to elicit by this witness.

The Court: You may state what your purpose is.

Mr. Jordan: I expect to elicit from this witness in as simple form as possible his interpretation of

(Testimony of Robert M. Gane.)

these reports for the period from March, 1936 to the end of 1940, so as to give your Honor a picture of the financial condition of this company when the plan of reorganization was confirmed, its condition at the time of the sale of the plant, and its intermediate progress during that period.

The Court: Yes.

Mr. Jordan: That is my purpose in asking the following questions of this witness, and I think I can assure you, and I believe that Mr. Gane will assure you he is not going to go into a great mass of figures. He is going to give your Honor, to the best of his ability, ultimate results.

Mr. Ferguson: If that be the purpose, if your Honor please, I object to any inquiry along this line or any testimony, for two reasons. First, this witness has said that these reports correctly disclose the facts which he obviously knows nothing about, but the more important thing is that it is an entirely improper way to elicit the facts. The figures are written in the annual reports from the books, and it is usurping the function of the Court to have an expert, if that be what he is attempting to qualify as, say what his opinion of the books and figures is.

The Court: The Court certainly has to have some information from an expert on these matters. You cannot expect the Court to take these books and examine them and take the figures down [525] and arrive at the conclusion that you think the

(Testimony of Robert M. Gane.)

Court should. I must have some assistance. I must have the assistance of this expert, and maybe the assistance of an expert that you will produce. I think it would be very interesting to hear what the witness has to say about these reports and what they show.

Mr. Ferguson: My objection is overruled?

The Court: Yes. You know what weight the Court usually gives an opinion on a fact. Sometimes the Court entirely disregards it, but the evidence is certainly admissible. Now, after this witness gives his testimony and after your expert has given his testimony, if it appears to me it is necessary for further examination of these books for an accounting to be taken, it will be taken. The objection will be overruled.

Mr. Ferguson: Then, if your Honor please, I would like to ask one or two questions.

The Court: Very well.

Mr. Ferguson: Q. You say that you did not examine Exhibit 3-A, which covers a period from April 1, 1935 to June 30, 1936?

A. I did not examine that one.

Q. In arriving at your interpretation what figures did you use, then, as reflecting the condition of the corporation immediately following the confirmation of the plan before March, 1936?

The Court: Is there any reason why these reports should not be shown to this witness?

Mr. Ferguson: If your Honor please, I furnished them with all that I had.

(Testimony of Robert M. Gane.)

The Court: I think the reason that 3-A was excluded was because it was not necessary to examine it. The testimony shows that separate reports cover the time from March 24, 1936 to the end of 1940, and I thought that was the entire period which is [526] under investigation here.

Mr. Ferguson: That is the purpose of my inquiry. I do not believe that is the fact. I think Mr. Gane will say that the period he examined started July 31, 1936.

The Witness: No, that is not correct. I started with the balance sheet shown in the printed plan of reorganization and traced all figures through from that to the end of December, 1940.

Q. The balance sheet figures for July 31, 1935?

A. Yes, I started with that and the opening figures of the 1936 statement differ from those figures by some \$7700, which represents accruals in that interim.

Q. Had not the plant inventory been written down from some \$700,000 a figure of \$200,000?

A. Not before the beginning of the period covered by the first report. They were written down \$399,000 during the initial period of the April 1st report.

Q. I understood you to say that you traced it against the 1936 statement.

A. No, I might have misstated that answer; the fact is at the beginning of the 1936 statement.

(Testimony of Robert M. Gane.)

Q. What did you take to be the beginning of the 1936 statement?

A. The initial deficit figure at that time, which was in round figures \$237,000 instead of about \$229,000, or pretty close to \$230,000 as shown by the balance sheet in the plan of reorganization.

Q. But that is a figure dated March 31, 1935, isn't it, that is not 1936, the \$237,391.37?

A. That is a deficit figure shown by the December 31, 1936 report of John F. Forbes & Company. We have that report there.

Mr. Jordan: I do not believe that is voir dire examination as to the qualifications of Mr. Ferguson.

Mr. Ferguson: All right, I will withdraw it. I wanted to [527] find out what the basis of his testimony was.

The Court: I think perhaps this witness' testimony will be made clear, and if it is not you will have an opportunity to bring it out on cross-examination.

Mr. Jordan: Q. Mr. Gane, refreshing your recollection from such notes and memoranda as you took from these various Forbes reports, which are in evidence, will you describe the financial condition of this company to the Court on March 24, 1935, as simply as you can, that being the date on which the plan of reorganization was confirmed.

A. In round figures, by figures which are very close, approximating the actual ones, the condition

(Testimony of Robert M. Gane.)

at that time was represented by working capital of approximately \$95,400, plant and other fixed assets of approximately \$724,600, making a total of assets of \$820,000, against which there were liabilities in the form of secured and unsecured five-year notes of \$550,000, or there was a net asset value at that date of about \$270,000. Converting that in terms of book value of 2212½ shares of stock in the hands of stockholders that represented a book value of roughly \$122.

Q. Now, commencing with the date March 24, 1936, will you describe to the Court the financial condition of this company as it developed progressively through to the end of 1940, as revealed by the Forbes reports?

A. This may not be in order, your Honor, but I would like to ask a question as to whether it is permissible to give a summary figure which will cover that entire period, or whether it is desired I give detailed figures year by year.

Q. I will answer that by asking you another question, Mr. Gane, you probably know better than I would about this; I wish you would give it to us in the manner that you believe would bring the matter more clearly to the Court's mind. [528]

A. I think a summary picture of the entire operation would be more comprehensible than the great list of figures required to cover it period by period.

Q. If you feel that you can give us a comprehensive summary in simple language for this period in question please give it to us that way.

(Testimony of Robert M. Gane.)

A. Then I can easily amplify those figures.

Q. If Mr. Ferguson wishes you to do so.

A. The change in the position as stated in answer to a previous question can be represented in part by adjustment of the opening position, too in part by the result of transactions that occurred. The adjustments represented—

Q. May I interrupt, will you tell us what you mean by adjustments?

A. By adjustment I mean mere changes in the books or the write-off of liabilities which existed at that time, things which were not representative of operations.

Q. Would you refer to an adjustment as a reduction by 10 per cent. under the plan of the outstanding obligations at the time it was confirmed?

A. Yes. Those adjustments, then, consisted of the reduction of liabilities of the plant in an amount of \$73,853, and reduced by other adjustments of the opening balance sheet, a net amount of decrease in that, or increase in liabilities of \$8533, or there was a net reduction of the opening deficit in the amount of \$65,319.76 through this adjustment that I mentioned. Then the operation resulted in the following item——

Q. Pardon me, Mr. Ganes. You were about to tell us about operations during the period from March 24, 1936 to the end of December, 1940.

A. That is correct.

(Testimony of Robert M. Gane.)

Mr. Ferguson: You mean figures covering the whole period at once?

A. The figures cover the whole period at once, and are [529] a net of those periods; the profit from the main and incidental operations, that means profit of a certain period reduced by losses in others amounted to \$96,924. A further discount of liabilities amounted to \$19,632.

Mr. Jordan: Q. Does it appear from these reports how those liabilities were discounted for the total amount that you have just given?

A. That figure that I gave is a composition of figures of the various years, and they do not all result from the same transactions, and it was by paying liabilities at an amount less than previously stated.

Q. Would you say those liabilities had been a portion of the deferred obligations or liabilities of the plant under the plan of reorganization?

A. They were.

Q. In other words, as I understand it, the company, through this period under discussion, saved \$19,632.27 by going out and compromising with the deferred creditors under the plan of reorganization at less than 100 per cent. on the dollar?

A. That is substantially correct.

Q. If it is not entirely correct will you correct me?

A. The only reason that I qualify it at all is I am not certain that they did go out and settle, or

(Testimony of Robert M. Gane.)

whether somebody offered to take less, or just exactly how it came about.

Q. But that was the result?

A. The result was that they paid less than the amount previously stated in the obligation. There was a further item of benefit, which was the acquisition of a certain amount of stock at a reduction from the par value, that reduction being \$26,672.

Q. Will you explain to us how that operated, just how that was brought about, as well as you can tell from the reports?

A. As well as I remember the situation it was a case where a [530] stockholder owed an amount slightly less than \$4000 to the company, and surrendered her stock, which amounted to somewhat over 300 shares, I think 305 shares, and a fraction, approximately that, to the company, in satisfaction of that debt.

Q. What happened to that stock?

A. The stock was returned to the treasury of the company.

The Court: That was the stock was cancelled?

Mr. Jordan: That is right, that is what brings about the reduction in the total of outstanding shares at the time the plan was concerned. You recall there was 4425 shares. There are now outstanding in the hands of the old stockholders 1907 $\frac{3}{4}$ shares, and 2212 $\frac{1}{2}$ shares with Mr. Bassick, Mr. Hyland, and Mr. Levit.

A. The total of benefits—

(Testimony of Robert M. Gane.)

The Court: You mean profits?

A. These are not profits. The profits only amounted to \$297,000, and these other items, while not profits, were of benefit to the corporation. That is why I used that unorthodox term; the total of those benefits was \$143,229.42.

Q. That includes the profits?

A. That is including profits, discount of liabilities and acquisition of stock at a discount, \$143,229.42.

The Court: We will take a recess until two o'clock.

(A recess was here taken until two o'clock p. m.)

[531]

Afternoon Session—2:00 O'clock.

ROBERT M. GANE,

Direct Examination

(resumed)

Mr. Jordan: May I have the last answer read?

The Court: Read it.

(Record read by the Reporter.)

A. That was only part of the answer, your Honor.

The Court: Do you wish to finish it?

A. I do.

Q. Pardon me, do you have an extra copy of that? A. Yes.

(Testimony of Robert M. Gane.)

Mr. Ferguson: This may be understood to be for the purpose of illustrating this gentleman's testimony?

The Court: Oh, yes.

A. The total of these items which I gave and which have the effect of improving the position is \$143,229.42. Against this there is what I consider a loss on the sale of the plant and which I will explain later of \$189,767.13, and a loss on the sale of other capital assets of \$1790.16, or a total loss of \$191,557.29. Those figures represent a net increase in the company's deficit during this period of almost five years in the amount of \$48,327.87. Now, the changes that I have given can be reconciled with the opening and closing figures of the Forbes reports in this way: The deficit that the Forbes reports show at the beginning of the period was \$237,391.77. This deficit was reduced by the adjustment of the initial liabilities and assets by the inauguration of the plan and subsequent changes in that opening balance sheet amounted to \$65,319.76, that I explained before, giving us an adjusted opening deficit of \$172,072.01. Then the increase in the deficit, which I just explained, amounted to \$48,327.87, and that added to the adjusted opening deficit produced the closing [532] deficit as shown by the Forbes reports, which was \$220,399.88.

The Court: What is the result of those figures?

A. The result, if any, is that during the period of operations that is, the period of very nearly five

(Testimony of Robert M. Gane.)

Q. At the top of the memorandum that you have handed to me on March 24, 1936 you give a figure of \$820,000 as the total value of the fixed assets.

A. Pardon me, your Honor, that is the total of the fixed assets and the working capital. The value of the fixed assets at that time was stated as \$724,600, that is the figure immediately above it, and since that time, represented by those figures, there had been—I do not want to give the figures, but there had been large additions to the fixed assets, and then they had also been reduced by depreciation and sale of some parts of them.

Q. Well, then, when you subtract from the amount which you have here and which was given to me, of \$724,600, when you subtract [534] from that all the deficits and deductions that should be made, what have you then as the total fixed value of the plant at the end of this five-year period and before the sale?

A. That figure arrived at in a different way would be, I think I said \$617,000, but computing it in the manner that you indicated it would require an adjustment for all of the depreciation figures throughout the period additions and deductions, and would require a little time to compute. The result, though, would be approximately the figure I have given.

Q. \$617,000?

A. That is right, your Honor. That applies only to the assets which were sold, not to the San Francisco assets retained.

(Testimony of Robert M. Gane.)

Mr. Jordan: Q. Mr. Gane, in your opinion, and basing your answer upon the financial reports, have the affairs of the Hendy Company improved financially between March 24, 1936 and December 20, 1940? A. Well—

Q. Let us take November 4, 1940.

A. Can you identify that date?

Q. November 4, 1940 is the date upon which the board of directors voted to grant the option to sell the plant.

A. Well, about 51 or 52 per cent. of the liabilities existing at the commencement of operations under the plan had been retired. There was an improvement. From another standpoint, that is to say, from the standpoint of stockholders equities and the position of the company other than retirement, paid, there had not been an improvement.

Q. Such improvement as there was was occasioned by the writing off of some deficit?

A. The writing off of indebtedness after the inauguration of the plan.

Q. And the wiping out of 50 per cent. of the value of the stock? [535]

A. That I had not considered in making any comparison; I merely had computed the stock as remaining, as long as the stockholders owned all of the stock that was outstanding; whether it was half of what they previously had or not there would be no change, so far as the treatment of that stock is concerned. The only time that there would be

(Testimony of Robert M. Gane.)

a change in the interest of the stockholders would be when that stock became owned by someone else, so that there would be another interest in the net assets.

Q. Mr. Gane, have you examined the plan of reorganization of the Joshua Hendy Iron Works?

A. I have.

Q. Approved by the Court on March 24, 1936?

A. I have.

Q. And you have read paragraphs 6-G and H of the plan, have you not? A. Yes, I have.

Q. I think I had better refresh your recollection by showing you a copy of the plan, and you can again read, if you like, those particular paragraphs.

A. I think that is sufficient to refresh my memory.

Q. Now, will you state whether or not the term "rehabilitation" has a definite and well-established significance in the field of accounting?

Mr. Ferguson: If your Honor please, that is immaterial, whether it has or has not. The question is, how was the term "rehabilitation" used in the plan and what was its legal meaning in the plan, and this is not the way to elicit this type of evidence.

The Court: Sustained.

Mr. Jordan: Q. Mr. Gane, in the light of your experience as an accountant and taking into consideration the information which you have ob-

(Testimony of Robert M. Gane.)

tained regarding the business operations and financial condition of the Hendy Realization Company during the [536] period from March 24, 1936 to the end of December, 1940, as reflected by the annual Forbes reports for that period, have you an opinion as to whether or not the affairs of this company had become successfully rehabilitated on December 20, 1940?

Mr. Ferguson: The same objection, if your Honor please.

The Court: He is asking now if he has an opinion. He is not asking him what the opinion is. It probably calls for a "Yes" or "No" answer.

Mr. Ferguson: I withdraw the objection to the question.

The Witness: A. I have.

Mr. Jordan: Q. Will you state what that opinion is?

Mr. Ferguson: Now, if your Honor please, I will object on the ground that it is the issue in controversy. That is not the way to prove an issue in this case. This witness has testified—

The Court: Do not argue. Just state your objection.

Mr. Ferguson: I submit, if your Honor please, this witness is not qualified, no proper foundation laid, and it calls for the conclusion of the witness, and improperly impinges on the Court's evidence.

The Court: Sustained.

Mr. Jordan: Would it be in order for us to

(Testimony of Robert M. Gane.)

offer in evidence the memorandum which Mr. Gane prepared?

The Court: It can be offered in evidence merely as illustrative of his testimony. I do not see any objection to it.

Mr. Ferguson: If that is the sole purpose.

Mr. Jordan: Yes. It summarizes your testimony as you have given it, Mr. Gane?

The Court: You have used it, and the witness has used it in giving his testimony.

A. That is correct. [537]

Mr. Ferguson: I suppose inasmuch as I objected to this line of testimony I should object on the same ground.

The Court: Overruled.

Mr. Jordan: I would like to offer this as Plaintiff's Exhibit next in order.

(The summary was marked "Plaintiff's Exhibit 4.")

Q. Mr. Gane, in addition to examining the Forbes statement covering this period which we have been discussing you also examined the sworn answers to the interrogatories which were propounded by Behneman & Shores in this matter, did you not? A. That is correct.

Q. And the answer sworn to by Mr. Moores?

A. I did.

Q. Taking the statements of John F. Forbes & Company and the answers to the interrogatories, were you able to determine the total amount of sal-

(Testimony of Robert M. Gane.)

aries and extra compensation paid by the Hendy Company to Mr. Bassick, Mr. Hyland, and Mr. Levit during this entire, almost five-year period?

A. Yes.

Mr. Ferguson: One moment, if your Honor please. Are you going to attempt now to alter the stipulation you entered into in the record yesterday?

Mr. Jordan: No, I am not. There is no question about the amount. This is preliminary.

Mr. Ferguson: Then what is the purpose of the inquiry, if I may ask?

Mr. Jordan: I am simply laying the foundation for further questions.

Mr. Ferguson: If your Honor please, I submit before we lay ourselves open we ought to know what the type of investigation is going to be. I have stipulated what these salaries and bonuses were.

[538]

Mr. Jordan: All right, I think you are entitled to it. It was stipulated that the total was \$174,835.89. That is right, is it not? If I am wrong you check me.

The Court: That has already been gone into.

Mr. Jordan: The thing I am leading up to, your Honor, is this, we have stipulated to the total amount.

The Court: If that is stipulated to that ought to be sufficient.

Mr. Jordan: We have the amount of the first liquidating dividends which totaled \$85,848.55 paid to the old stockholders, and we also have in evi-

(Testimony of Robert M. Gane.)

dence the estimate that will be a sum approximating \$15 a share additional liquidating dividends to be paid on all of the outstanding stock. I have asked Mr. Gane to calculate, with those figures, and taking into consideration that estimate, the total amount that would be received from the company by Mr. Bassick, Mr. Hyland, and Mr. Levit during this five-year period in the way of salary, additional compensation, and by way of any further liquidating dividends they receive on the 2212½ shares as against the amount heretofore received by the stockholders, plus the estimate of \$15 a share that they will receive. I think it may be helpful to your Honor to get those figures.

The Court: Yes, I would like to have them.

Mr. Ferguson: Might I inquire from Mr. Jordan off the record, I do it in an effort to shorten the matter.

Mr. Jordan: Is there any question left in your mind about this figure of \$174,835.89? I believe you stipulated to that yesterday, but let us clear it up.

The Court: Yes, it has already been stipulated to.

Mr. Jordan: Now, will you state, Mr. Gane, what percentage [539] of the total of the salaries and extra compensation paid to Mr. Bassick, Mr. Hyland, and Mr. Levit, plus the anticipated payment to them of \$15 a share on their 2212½ shares, how that would bear to the total amount to be distributed by the company, which would, in addition, include the \$85,848.75 heretofore distributed to the

(Testimony of Robert M. Gane.)

old stockholders of the Joshua Hendy Iron Works, plus \$15 a share anticipated liquidating damages?

Mr. Ferguson: Your Honor, the witness may give an answer which signifies nothing, because it is comparing unlike things. What they have done is taken in lump in all of the salaries plus bonuses, plus everything else, and they are trying to compare that with the dividends.

The Court: I do not know as to the comparison, but it seems to me an effort should be made to show the total amount of money received by these parties, including the amount they would receive on the stock at \$15 a share.

Mr. Ferguson: If it will be received. Of course, that is a pure estimate.

The Court: It is a pure estimate. They have already received \$174,835.89?

Mr. Ferguson: Yes.

The Court: If they are to receive something in addition what is the amount that they would receive? Isn't that what you want?

Mr. Jordan: That is right.

The Court: You want to add that to this \$174,835.89?

Mr. Jordan: Yes.

The Court: Let us have that, if you have computed it.

Mr. Jordan: Q. You have computed those figures, have you not?

A. Yes, I have computed them. [540]

(Testimony of Robert M. Gane.)

The Court: Make it clear, Mr. Jordan.

Mr. Jordan: Q. Mr. Gane, will you give us, taking into consideration all salaries and extra compensation paid up to this time to Mr. Bassick, Mr. Hyland, and Mr. Levit, and anticipated future liquidating dividends to be paid to them on their 2212½ shares of stock, and in giving that total amount add salaries and bonuses and the anticipated dividends, and then give the amount that will be paid to the old stockholders on the 1907¾ shares, that is the amount heretofore paid and the estimated amount to be paid at \$15 a share, and then comparing those totals give us the percentage proportion that would be withdrawn from the company by those two groups.

A. The amount that has been paid to the officers, as stated, was \$174,835.89, and on the basis of the estimated future distribution of \$15 a share they would receive on 2212½ shares \$33,187.50, or a total of \$208,023.39. The stockholders received on the first liquidating dividends \$85,848.75, and on the basis of the estimate used before they would receive on their 1907¾ shares \$28,616.25, or a total to the stockholders of \$114,465. The total paid out to both groups would be \$322,488.39, and the amount paid to the stockholders, paid and to be paid to the stockholders, would be 35.49 per cent.

Mr. Ferguson: One moment, I have an objection to any comparison because they are not comparing the right thing.

(Testimony of Robert M. Gane.)

The Court: I understand. So far as the answer to the question is concerned it is mere argument.

Mr. Ferguson: I think most of his testimony has been.

The Court: That is all right. I want to hear it. I will accept it as argument on the part of Mr. Jordan. Give me the percentage.

A. The percentage paid to the stockholders [541] would be 35.49 per cent. and to the officers 64.51 per cent. of the total amount paid out.

Mr. Jordan: Q. Mr. Gane, I am going to show you a typewritten summary such as you have just given us, and ask you if that is the substance of your testimony that you have just given on this subject? A. Yes, I prepared it.

The Court: Do you want to offer this in evidence?

Mr. Jordan: Yes. I would like to offer that in evidence as Plaintiff's Exhibit 5.

Mr. Ferguson: The same objection, if your honor please.

The Court: Strictly speaking, your objection is good, Mr. Ferguson, but I am going to receive that, as I said, I will receive that as a part of Mr. Jordan's argument in this matter. It is something that I want somebody to figure out for me, and I am glad to have the witness do it. With that statement your objection is overruled.

(The document was marked "Plaintiff's Exhibit 5.")

Mr. Jordan: That is all. You may cross-examine.

(Testimony of Robert M. Gane.)

Cross-Examination

Mr. Ferguson: Q. Your conclusions to which you have testified in chief, Mr. Gane, were predicated, as I understand it, upon and solely upon the annual reports of Forbes & Company, is that correct?

A. Some of those were. Others were based upon the answers to the interrogatories in the case. I believe those were the two sources.

Q. Then with respect to values and current assets, fixed assets, etc., did you take the figures in the Forbes reports?

A. I think that it is correct to say that in all cases the figures I used came from the Forbes reports.

Q. That is not true with respect to fixed assets, is it? Is it not a fact that the fixed assets in the Forbes reports [542] for all the years involved sums of \$300,000 or \$400,000 less than the figures you used?

A. No, that is not correct. In the opening balance sheet of the Forbes statement that I used those fixed assets were stated without that reduction of almost \$100,000.

Q. But you have ignored those portions of the Forbes reports where they have created a value?

A. No, that is not correct. I used the reduction in value for what it is purported to be, which is an adjustment made to the books, but not one which represents an adjustment of assets or transaction

(Testimony of Robert M. Gane.)

in any way. The Forbes report which reflects the sale treat the result of that sale in that having previously adjusted a deficit account for the write-down of these assets have accordingly adjusted the deficit account for what is then termed a profit from that sale.

Q. But in arriving at your final result you have not given any effect at all to the fact that those assets were written down, have you?

A. Yes, I have.

Q. Where, in what way?

A. In that I have considered that write-down in my figures.

Q. What the plant was sold for and what it had been originally put in the books for was what you called loss on the sale. Where does that give effect to the write-down in the assets?

A. That particular point seems to me to be a mere question as to the term or language used. As between the opening balance sheet and the closing balance sheet, it seems to me to make no difference whether we say we write the assets down and then say we sold them for \$180,000 more than the write-down, or whether we say we took the original figures and sold them for \$190,000 less than that. It is the same thing in the end.

Q. Well, now, my question, which you have not yet answered, is [543] did you give any effect to write-down, and the answer is you did not give any effect to the write-down, did you? A. I did.

(Testimony of Robert M. Gane.)

Q. In what way? You have not answered that. How did you give any effect to the write-down? You have taken the value before it was written down of the fixed assets, and you have taken the sales price of the plant, and you have compared the two, and you say the difference is loss in value in the plant and deficit in the sale of the plant. Where in that computation have you paid any attention to the write-down effect in all of those years?

A. I did not take the figures that you mentioned, but instead I took the write-down of the plant and deducted from it the profit to arrive at the loss figure that I used.

Q. You testified on direct examination you got the answer working backwards, to find out what the value and what the loss on the sale was. Is that customary in accounting practice?

A. I do not like to seem to contradict you, but I do not think I testified to the effect that I got the answer working it back, but I think I testified that I used two factors involved in the recording of this particular transaction, and used those to arrive at the answer.

Q. What were those factors?

A. Those factors were the adjusting entry on the books in 1936 and the profit shown on the adjusted figures in 1940.

Q. Didn't you say to Judge St. Sure the value at the end of the five years immediately before the sale was \$617,000, and by working backward and

(Testimony of Robert M. Gane.)

working right down to \$390,000 you found the values to begin with?

A. That is correct, but that is a different computation, and as I explained at the time it would take considerably more time to work out the answer to that [544] question by using the asset figures and the various adjustments to them, but by taking a short cut I could arrive at the same result by a simple computation.

Q. What did you do with depreciation in the meantime?

A. Depreciation in the meantime had been shown or its effect had been shown in the figures that I used.

Q. Depreciation is only shown in the reports on the basis of lower valuation, is it not?

A. That is correct.

Q. In figuring the value between the \$724,000 odd that you started with and \$617,000 that you finished with, what did you do with depreciation?

A. I took depreciation as shown by the reports because I felt that the fact that the write-down of those assets would result in a reduced depreciation and therefore an increased profit would not change it; the adjustment would be in the ultimate profit or loss shown in the sale. I considered that would have no effect on this case.

Q. You have that depreciation in assets with \$724,000—

A. (Interrupting) I do not recall the figures that you are using—

(Testimony of Robert M. Gane.)

Q. (Interrupting) The depreciation was \$300,000?

A. According to accepted principles of accounting in these statements depreciation on the gross amounts has been used.

Q. Is that what you applied?

A. No, I took the figures according to the Forbes reports.

Q. Irrespective of the fact that they had written it down from \$724,000 to \$300,000?

A. Yes, as I explained the reason for that is that the net result would be the same, for the simple reason that the greater amount of depreciation taken the greater amount of profit or smaller amount of loss on sale, and the greater amount of depreciation taken the lower would be the profit from year to year. [545]

Q. Did you read those portions of the Forbes reports with respect to the write-down of values?

A. I did, and if I remember it was stated in the report that the write-down of value was on the basis of appraisals which had not been submitted to them.

Q. Didn't they state they were on the basis of appraisals which had been made in the reorganization proceeding before this Court?

A. That is not my recollection of the statement. If I may have it, I will be glad to read it.

Q. I will refer you to Plaintiff's Exhibit 3-A, page 5 (reading).

(Testimony of Robert M. Gane.)

A. It says no detailed appraisal report was available for our inspection.

Q. But did you read that portion of it which is stated it was made during the course of the proceeding? A. Yes, I read that.

Q. You still submit that it had been given no consideration?

A. Not from the standpoint of arriving at a profit on the sale of the plant.

Mr. Ferguson: I have no further questions.

Mr. Jordan: That is all.

Mr. Jordan: Mr. Ferguson, I have gone through this copy of the stockholders meeting on November 15, 1940, which contains a part of the minutes and option in favor of MacDonald & Kahn, Inc., dated November 4, 1940, and I will, with your Honor's permission, offer the entire copy of the minutes of this particular meeting in evidence as Plaintiff's Exhibit next in order.

(The document was marked "Plaintiff and Respondents' Exhibit 6.") [546]

ALFRED J. MAYMAN,

Called for the Plaintiff and Respondents; Sworn.

Mr. Jordan: Q. Mr. Mayman, you are an assistant cashier of the Bank of California, National Association, are you not? A. I am.

Q. How long have you been with the bank?

(Testimony of Alfred J. Mayman.)

A. A little over twenty years.

Q. A little over twenty years? A. Yes.

Q. And from April 8, 1936, up to March 17th of this year, you continuously acted as a director of The Joshua Hendy Iron Works, did you not?

A. I did.

Q. You are not on the board at the present time, are you? A. I am not.

Q. In addition to being a director of the company were you, during the period that I have mentioned, also an officer of the company?

A. A part of the period.

Q. Well, for what period were you an officer?

A. I take it back. The first year of the period we were discussing I was assistant secretary-treasurer, and after that secretary.

Mr. Ferguson: I believe he was appointed assistant secretary-treasurer on April 22, 1936, and secretary on March 15, 1937. The minute book so shows.

Mr. Jordan: Q. That refreshes your recollection, does it, Mr. Mayman? A. Yes.

Q. We will accept that. On the first occasion when you were elected to the Hendy board you were nominated by the Bank of California, were you not, to the board? A. That is right.

Q. You were the bank's representative on the board during the entire period of time that you served?

A. In so far as the directors represented any in-

(Testimony of Alfred J. Mayman.)

terest, but I really represented the [547] company.

Q. But you were on the board at the nomination of the bank? A. Yes.

Q. You had charge, I believe, of the taking in of the outstanding trustees receipts and certificates that had been in the hands of the old stockholders and issuing in exchange for them new certificates of stock in the Hendy Realization Company after the voting trust had been terminated on or about December 21, 1940? A. That is right.

Q. First of all, going back to the spring of 1940, in May and June, I believe, do you recall that certain negotiations were had between yourself and myself and Mr. Ferguson with respect to the surrender by Dr. Behneman of his outstanding shares in the Hendy Company to the voting trustees, in exchange for voting trust certificates?

A. There were some negotiations, I don't recall the date, Mr. Jordan, but I think they might have been about that time.

Q. Would your recollection go to this extent, to say that it was in June of 1940 that the voting trust certificates were actually issued to Dr. Behneman?

A. I could find out definitely.

Q. I have the records here, suppose we verify it.

Mr. Ferguson: Mr. Jordan, if you say it is June that is satisfactory to us.

Mr. Jordan: I have not the exact date, myself.

Mr. Ferguson: It is immaterial.

Mr. Jordan: I don't think it is particularly material.

(Testimony of Alfred J. Mayman.)

A. If my memory serves me it was about that time.

Q. I am reasonably satisfied it was in June; and do you recall at the time that Dr. Behneman approached the company with the idea of surrendering his old stock certificates and taking voting trust [548] certificates, he was only able to find 940 shares out of his total shares of holdings of record of 1244 shares? Do you remember that? A. Yes.

Q. In other words, he was unable to find a certificate evidencing $304\frac{1}{2}$ shares of his holdings?

A. I think that is the number of shares.

Q. In June or thereabouts, last year, it is true, is it not, that a voting trust certificate was issued to Dr. Behneman for 470 shares, which would be one-half of the 940 shares that he surrendered?

A. I do recall that a voting trust certificate was issued to Dr. Behneman for one-half of the number of shares which he actually surrendered to me, to the secretary, and the issuance of voting trust certificates, or trustees certificates were withheld at that time covering the missing shares.

Q. There was considerable discussion about the issuance of voting trust certificates for the missing shares at that time, was there not?

A. That is right.

Q. The upshot of the entire thing was that the company finally issued to Dr. Behneman a voting trust certificate for $152\frac{1}{4}$ shares of stock upon Dr. Behneman's executing and delivering to the com-

(Testimony of Alfred J. Mayman.)

pany his personal indemnity agreement, under which he guaranteed to save the company harmless in the event that that stock later showed up in the hands of anyone else?

A. That is right. You used the word "voting trust certificates," which I do not think is exactly right. I think they were trustees' receipts.

Q. Trustees' receipts, I think that is the title used. A. That is right.

Q. In any event, you did issue such a certificate to Dr. Behneman for 152 $\frac{1}{4}$ shares upon his personal indemnity agreement? [549]

A. That is right.

Q. You also recall, do you not, an occasion on December 28, 1940, when Dr. Behneman and I called upon you at the Bank of California, which was on a Saturday morning, for the purpose of presenting Dr. Behneman's trustees' receipts and certificates and taking delivery of the new certificates which would represent a like number of shares, and also take delivery of Dr. Behneman's \$45 per share on his holdings, which totaled 622 $\frac{1}{4}$ shares, that is the first liquidating dividend; do you recall that occasion?

A. I remember your visit very well.

Q. Do you recall at that time you delivered to Dr. Behneman a new stock certificate of the Hendy Realization Company for 470 shares and at the same time you paid to Dr. Behneman \$21,150 on the

(Testimony of Alfred J. Mayman.)

470 shares, as the first liquidating dividend on that number?

A. I did pay him, I don't recall the amount, but \$45 a share on 470 shares.

Q. That was on the certificate which represented the stock that he had and surrendered?

A. That is right.

Q. You recall, do you not, at that particular time, on that occasion you refused to deliver to Dr. Behneman a new certificate in exchange for his voting trust certificate for 152 $\frac{1}{4}$ shares that had been issued on his personal indemnity?

A. I do not like to use the word "refused". I do not think I actually refused, Mr. Jordan. I think the substance of my conversation was that I was prepared to issue a certificate to Dr. Behneman and a check for \$45 a share on that certificate, but I preferred consulting the company's attorney before doing so, as the stock had now a real, tangible value.

Q. In any event, you did not pay Dr. Behneman on that occasion on the number of shares which at that time represented the lost [550] shares?

A. I did not, but if my memory is correct I believe that Dr. Behneman agreed that I could talk it over with the attorneys.

Q. I will agree with that, we did, but I want to ask you if on that occasion, and as a reason—I withdraw that. Didn't you at that time, Mr. Mayman, tell Dr. Behneman and myself that you be-

(Testimony of Alfred J. Mayman.)

lieved that the board of directors of the company would require him to supply a surety company bond as a condition to receiving his new stock certificate for 152 $\frac{1}{4}$ shares, and as a condition to receiving the first liquidating dividend on that? A. Yes.

The Court: How is this material?

Mr. Jordan: In this respect, your Honor, I am leading up to a conversation which I believe will show at least the state of Mr. Mayman's mind at that particular time as to his view on the value of the stock in June, 1940, as compared with December 28.

The Court: How helpful will that be to the court?

Mr. Jordan: Only to this extent, that he as one of the directors the company was unwilling to issue a new stock certificate to cover shares that had been lost, that Dr. Behneman could not have produced and surrendered.

The Court: They did issue them, didn't they?

Mr. Jordan: They did issue on his personal indemnity in December. Your Honor will bear in mind that they issued this voting trust certificate for lost shares in the spring of 1940, or in June, to be exact, on Dr. Behneman's personal indemnity bond, but in December, after the sale and the money had come in they required a corporate surety bond.

The Court: I do not see how that would be material. I do not see how it is going to be helpful to the Court. Here is [551] a long preliminary ex-

(Testimony of Alfred J. Mayman.)

amination for the purpose of asking this witness what the value of the stock is on a certain date. Is that it? My thought is that you ask him that question.

Mr. Jordan: Q. Mr. Mayman, is it not true that on this occasion, on December 28, 1940, that in explaining why the board of directors required a corporate surety bond as a condition of paying Dr. Behneman his dividend on these 150 shares and giving a new certificate of stock, that you stated that the directors' reason for demanding a surety bond at that time in December, 1940, as a prerequisite to the issuance to Dr. Behneman of the new certificate for 152 shares of stock, and of the payment to him at that time of the liquidating dividend payable thereon, was that the stock at that time, in December, 1940, had a definite intrinsic value, whereas it had little or no value in June, 1940, and that the voting trust certificates evidencing the 152 shares was issued to Dr. Behneman upon his personal indemnity bond?

A. No, I have no recollection of such a statement, at all. I do recollect, I think, as I told you a moment ago, that the reason that I gave for the insistence of the surety bond, not the insistence, but I thought that the reason of requiring a surety bond was now that the stock had a very definite, tangible, ascertainable value, and making no comment at all about the previous value of that stock. I do not see how I could have made the statement that you at-

(Testimony of Alfred J. Mayman.)

tribute to me, because at the end of 1939 the stock did have value.

Q. The fact of the matter is that the company did require Dr. Behneman to furnish a corporate surety bond as a condition to paying him the first liquidating dividend and delivering the new certificate, did it not? A. That is right.

Q. Mr. Mayman, the Bank of California was paid the first liquidating [552] dividend, was it not, on the shares which it secured on or about September 20, 1940, from the Estate of Mary McGurn?

A. It was paid the Fresno Land Company, the nominee of the Bank of California.

Mr. Jordan: I think that is all, Mr. Mayman.

Mr. Ferguson: No questions.

Mr. Jordan: Plaintiff Shores and Respondents Shores and Behneman rest, your Honor.

The Court: We will take a short recess.

(After recess:)

Mr. Ferguson: If your Honor please, preliminarily I would like to make some offers. First I would like to offer in evidence a record in the reorganization proceedings under 77B. It is on file here, but I wish to make that offer.

The Court: Very well.

Mr. Ferguson: In that connection, I desire to call the Court's attention to certain specific portions of the record which may be helpful. I might state to the Court in explanation, originally your honor referred this matter to Special Master Judge Beasly. Several hearings were had before Judge Beasly which are fully recorded; the proceedings were had on October 22 and October 28, 1935, at which time Mr. Byrne, of Byrne, Lamson & Jordan, appeared on behalf of Dr. Behneman and objected to the plan. Judge Beasly indicated his view upon the matter, but died before a formal order could be made. Subsequently, Judge Wyman was appointed Special Master, and a further hearing was held before him on the basis of the transcript of the proceedings before Judge Beasly, and additional examination before Judge Wyman. In so far as the argument of the law and of the facts went before Judge Wyman, it was Mr. Byrne's suggestion at [553] that time that that be incorporated in the briefs, and those briefs are on file. I first desire to refer to these portions of the record.

Mr. Jordan: Have you offered the record?

Mr. Ferguson: Yes.

Mr. Jordan: Has it been admitted?

The Court: I will admit it. I do not see any objection to it. It is before the court anyhow.

Mr. Jordan: I do not see that there is any reason to introduce it in the record in this case.

The Court: There may not be. I will admit it anyhow. The record in the reorganization proceed-

ing will be considered part of the evidence in these cases now before me.

Mr. Ferguson: Does your Honor wish it marked as an exhibit?

The Court: No, it is not necessary.

Mr. Ferguson: Referring to the transcript of the proceedings before Judge Beasley now, the first portion of this transcript is as to the value of the stock. The Court will recall that Mr. Jordan was referring to the value of some \$123 a share that the stock had at the time of reorganization. I should like to refer to the actual proceedings and the testimony taken as to the value of the stock. I refer you to pages 24 and 25 of the trustee's testimony, W. R. Bassick, first. There had been preliminarily to this many pages of discussion as to the value.

The Court: Is that a transcript of the evidence?

Mr. Ferguson: This is a transcript of the proceedings. I will read from page 23, if your Honor please.

Mr. Jordan: Your honor, before counsel goes any further, inasmuch as Mr. Bassick, a defendant in this matter, has not been present during this trial, I think we are entitled to know [554] the materiality as to the issues of this case of testimony that was taken in the reorganization proceeding, at the time that the fairness and possibilities of the plan were under consideration.

The Court: The materiality of it is, it is testimony regarding the value of the stock at the time

that the reorganization proceedings were being held before Judge Beasley. It seems to me that is material, Mr. Jordan.

Mr. Jordan: Very well, your Honor.

Mr. Ferguson: This is on cross-examination by Mr. Norton, who was at that time representing Mr. H. L. E. Meyer. This is on page 23.

“Q. Are you acquainted with what the liquidation value would be at the present time of that Sunnyvale property and all the machinery and other items covered by the deed of trust securing the bond issue?”

“The Witness:—“that is Mr. Bassick”—I have not made any figures for liquidating value of the property, but I might say to you that I have had 25 years of experience in manufacturing of every kind; there is a big difference between liquidating value and a going business. As a going business, the inventory and tools, fixtures, are a very important part of the business. In liquidating that don't mean anything except to that particular business. Take a big 16-foot planer, or mill we have there, with a very expensive foundation; that foundation is an asset when it is a going business. When you come to sell that business it is a liability, because it has to be disposed of. It is a detriment to the property. In my judgment there is no market at all for that property except as a going business. The best interests of every-

body would be served by keeping it as a going business.

“Mr. Norton: My idea, my client insisted that the property [555] was worth a half million dollars, which would be quite a bit larger than the amount of bonds outstanding. I was wondering how much less than half a million.”

Interpolating, the Court will recall that the accountant that Mr. Jordan put on the stand testified to a value something in excess of that.

“A. As a going business it is my best judgment it is not worth anywhere near that. As located at present, it would be worth \$100,000.

“Mr. Madison: Q. Turning to Exhibit A, where are the lands covered by the deed of trust and other property? Does that come into the item ‘Sunnyvale Plant’? A. Sunnyvale plant.

“Q. Seventeen thousand is the book value?

A. Yes, the value that was left on the books.

“Q. Now, the buildings—Is that \$102,000?

A. That is \$102,000, yes, nearly \$103,000.”

Now, he testified that the book value was about \$100,000.

On page 18, the same witness, on direct examination, testified:

“Q. Can you say what, in your opinion, in a general way, would be the actual value of these assets with the corporation as a going

concern?
cent.”

A. I should say about 50 per

Now, turning to page 51 of the same transcript, and this is the testimony of Mr. John A. Smiley, and by way of explanation, this is all in the record, at the close of the first hearing, and after Mr. Bassick's testimony with regard to the value of the plant, there was a suggestion that there be some independent testimony with respect to the value of the plant, and Mr. Smiley was engaged for that purpose, and he did testify, and this is the testimony given by him, after testifying to his qualifications, [556] and concerning the fact that he was not an interested party in the employ of the Joshua Hendy Iron Works. This is on page 51:

“Q. Mr. Smiley, I realize, of course, you have had a very few days to examine the plant at Sunnyvale, but have you been able in that time to arrive at some estimate of the value of the Sunnyvale properties or plant of The Joshua Hendy Iron Works?

“A. Yes, I have. In my own estimation, I have formed an opinion about what the property is worth.

“Q. Now, looking at the value of these properties, first, as of their value to the debtor as a going concern. Have you arrived at any value of the property as a going concern?

A. I have.

“Q. Will you state briefly to the court what you find the value to be, in your opinion?

“A. The value on historical basis, less depreciation at the present time, \$295,000.

“Q. In round figures?

“A. In round figures, yes.

“Q. Did you also check that computation by an appraisal of the values of the properties as a going concern on any other basis?

“A. Yes, I took the same figures and worked them up on a reproduction cost basis and depreciated them, and arrived at a figure of \$228,000. That was only to check the reasonableness of my first figures.

“Q. Now, those figures are estimates by you of the value as a going concern of those assets to the debtor, are they? A. Yes.

“Q. Would the same figures represent their value, the value of the assets, if the plant was to be broken up and sold at the present time?

“A. No.

“Q. And have you made any estimates of the break-up value or liquidation value of those assets?

“A. Yes; I arrived at a value of \$92,000. That is the Sunnyvale plant only, not San [557] Francisco.

“Q. We understand. You have prepared a rough recapitulation, showing the items attributed by you to each of the book entry items,

to the buildings, land, and so forth, the check-up of those figures, have you not?

“A. Yes, I have.”

If your Honor please, the Court will find in the reports of Forbes & Company in more detail the basis of arriving at those figures.

Now, turning to pages 46 and 47 of the same volume of the transcript, starting with the words “The Master”—and it may be recalled in this regard that Judge Beasley originally came from Santa Clara County, and was familiar with the conditions in that locality.

“The Master: A fair estimate of the value of that. I do not doubt the estimate of the trustee. I think for this record you should have a fair estimate of the value. I could name somebody, but I do not want to do so, or he will expect a fee. He could go down and take a week or more and charge \$10 a day and the result would be that much more expense. It seems to me somebody ought to have him come here and subject himself to cross-examination so they can convince their clients as to the value of the plant. I doubt if it is of much value. If I were a lawyer facing this matter, I would be very slow to accept the idea that that is worth much down there. That other plant, when it was built, was first class thirty years ago. It has been standing there and they never have been able to dispose of it for any-

thing. These plants, when they are reorganized, or when they are sold in liquidation, they are found to be in the position where some person is interested, and he can force the hand of everybody else and can purchase it." [558]

Now I turn to page 39.

Mr. Jordan: Mr. Ferguson, if I can interrupt just a moment, I have this thought in mind. This testimony is part of the testimony that was taken in connection with this reorganization of the Hendy Company, and it is true the reorganization matter is one of the consolidated matters before your Honor. However, we have another case here, the case of *Shores v. Hendy Realization Company, et al*, which was originally a plenary suit transferred to this court from the Superior Court of the City and County of San Francisco. I think, obviously, this type of testimony, as we are trying that case also, would not be material or admissible in that case. And your Honor also will bear in mind that we have a motion to dismiss the reorganization petition upon the ground that the Court has no jurisdiction over the subject-matter, and that has never been ruled upon. And I would like to ask that the record show an objection on our part as to the materiality of all of this type of testimony in so far as the case of *Shores v. Hendy Realization Company, et al* is considered.

The Court: Your objection comes a little late, it seems to me.

Mr. Jordan: Then I will object from this point on.

The Court: It may not be material. I do not know whether it is material or not. I mean in the case that you mentioned it may not be material, at all, in the Shores case. Are you objecting?

Mr. Jordan: I object, if your Honor please, to any further testimony along this line in so far as the case of Shores v. *Henderson* Realization Company, et al is concerned.

The Court: Overruled.

Mr. Ferguson: Now, on page 39, there is a discussion, and then the master speaks, and in this connection this controversy [559] is had with Mr. Byrne, of the same firm of attorneys representing Dr. Behneman, one of the two defendants in the petition, who urged that the stockholders could not be required to give away 50 per cent. of their stock.

“The Master: It is conceded here that this corporation is insolvent.

“Mr. Pedder: Absolutely insolvent.

“The Master: Everybody present concedes the insolvency?

“Mr. Pedder: Absolutely busted.

“Mr. Byrne: I think it is busted.”

Now, turning to the Master's Report to your Honor, which is Judge Wyman's report, page 5——

Mr. Jordan: It will be understood that my objection will run to this entire line of testimony as

far as *Shores v. Hendy Realization Company, et al* is concerned, your Honor?

The Court: Yes.

Mr. Ferguson: The Master's Report shows under this heading, "Admissions as to insolvency of the debtor"—In other words the contention, the Court may recall, was to the effect that since the debtor was hopelessly insolvent the stockholders should be made to give up 50 per cent.

"Admissions as to insolvency of Debtor. It also will be noted that there appears in the record, page 39 of proceedings of October 22, 1935 the following admissions: 'The Master: It is conceded here that the corporation is insolvent?'

" 'Mr. Pedder: Absolutely insolvent.

" 'The Master: Everybody present concedes the insolvency?'

" 'Mr. Pedder: Absolutely busted.

" 'Mr. Byrne: I think it is busted.'"

Then turning to page 7: [560]

"The question of fact, it properly may be said, is self-determined. In other words, since it has been conceded by all that the corporation is insolvent, that element of the case is settled. Under the circumstances it appears that the Court is bound to proceed upon the theory that at this stage of the proceedings the stock is utterly worthless."

Then the Court considers it at some length, and I will point out that in paragraph 16 of the Order confirming the plan and the Report, the Court followed the thought of the Special Master.

Now, before I pass from the record, although I may later come back, it may be helpful at this time to also point out that there was discussion during the time that the plan was under consideration as to whether or not there were any considerations such as now urged by Mr. Jordan upon the right of the directors to distribute the stock upon rehabilitation, in that the attorneys took the absolutely opposite position.

Returning again to Volume 1, page 31, Mr. Byrne had made a rather long statement, I won't read all of it, relating to the constitutional objections, but in summarizing his objection to confirming the plan he said:

“Furthermore, they say to give it to the board of directors to give away as they please for the successful rehabilitation of the company's affairs. All right, what does that mean? I asked Mr. Pedder, who is attorney here, I said, ‘Does that mean when it is on a dividend-paying basis? Does that mean when the debts are paid? Is that a condition?’ He said, ‘Oh, no, that is to give it away at any stage that they want to.’ We say that there is no consideration for such a plan, that it is not within the meaning of 77B, and if it were it would be tak-

ing [561] away one's property without due process at law. There is no consideration, whatever, given for it."

Mr. Byrne: Just a moment. There was no such understanding there and I do not think the wording of the transcript bears out any such statement. If you will look through that you will find I objected to it, that it was indefinite as to what it meant.

Mr. Ferguson: I will submit this language, and from the language it is our contention that it shows it was Mr. Byrne's objection to the plan that this language constituted no bar to the discretion of the board of directors and it could be distributed at any time, and it is now claimed that it cannot be distributed as a reward for successful management and rehabilitation.

The Court: Mr. Ferguson, why argue the matter now?

Mr. Ferguson: On page 37 Mr. Byrne again said:

"You do not modify the right of stockholders by taking out of their pockets and putting into the pockets of anybody else. Furthermore, there is no condition upon which these people are to get this stock, at what stage of the game."

That was his contention of what the plan meant at that time.

Now, incidentally, on the same page it might be of interest to note the master's comment, in the third paragraph from the bottom:

"The Master: Why cannot the Court approve"—Just before that the Master had said:

"The Master: In a matter of this kind, has the Bankruptcy Court authority in response to a plan of this kind that is consented to by a sufficient number of stockholders, to wipe out some of the stock? I am speaking of common stock certificates. [562] We have the right to do that.

"Mr. Byrne: To make them surrender?

"The Master: Yes, cancel it.

"Mr. Byrne: I am rather inclined to think it could be cancelled.

"The Master: Why cannot the Court approve the use of it for the purpose of securing a competent management and paying the managers, instead of the money, paying them by delivering stock to them?"

That, by way of interpolation, we contend was done in this case.

There was no extended oral argument before Judge Wyman when it was submitted to him, but by reason of the fact that the statements of counsel were in their briefs, I desire to refer to that portion of it which expresses their contention. This is the brief of Byrne, Lamson & Jordan, filed

January 6, 1930, starting on page 5, line 15.

Mr. Jordan: If your Honor please, I am going to object to Mr. Ferguson reading a brief that was filed some five years ago in a matter that involved an entirely different issue, namely, a dispute on a plan of reorganization. If he wants to argue that in this case later on that is his privilege, but to read argument in a brief filed at such a long period of time, it seems to me is not evidence in this case, and should not be permitted in the record as such.

Mr. Ferguson: May I be heard?

The Court: Overruled.

Mr. Ferguson: Starting at line 15, page 5:

“Mr. Byrne: Here we have a plan to take away 50 per cent. of the shares of Harold M. F. Behneman and to give it to the [563] board of directors, which it is obvious will be entirely controlled by the Bank of California, a secured creditor.”

The Court: You are not contending that these are admissions by a party. They are simply to show the attitude of the attorneys at that time.

Mr. Ferguson: To show what they thought of the plan when it was under consideration and adopted, and I think in arriving at the intention, that is important. In the same case a brief was filed, and these briefs took the place of oral argument. A brief was filed by the secured creditors,

in which it was stated, "The conclusive fact is that the corporation is admitted insolvent and the stockholders no longer have any equity in the assets of the corporation.

Mr. Jordan: I am going to make the same objection at this time to the reading of that brief as well, on the same grounds.

The Court: Overruled. I will allow the reading of it. It is in the nature of argument, there is not any doubt about it, that is understood. There is no admission on the part of the attorneys that I can see, from anything that has been read so far. It simply shows what the attitude was during that trial. Of course, you have a right to change that, I suppose.

Mr. Ferguson: I will now refer to the report of Judge Wyman.

Mr. Jordan: Is that the last report, Mr. Ferguson?

Mr. Ferguson: This is the report on the plan dated February 19, 1936. It says on page 9:

"Bluntly put, the proposition to the stockholders is this, you have nothing now except some worthless stock."

I should like to also offer, if your Honor please, the minutes of the meeting of the board of directors and stockholders—I think there is danger in having only isolated portions read [564] as has been done. The meeting of the board of directors

with respect to the granting of the option has been read, but it has not been pointed out, although there is in evidence a copy of the stockholders meeting, pointing out that before the voting trustees permitted or authorized the sale of all of the Sunnyvale assets a letter of intention was directed to all of the old stockholders and no objection was made.

Mr. Jordan: What kind of a letter?

Mr. Ferguson: It is set forth in the minutes in haec verba. It is in evidence. I think there is danger unless the full minutes are read. We are very anxious to have the court know exactly what was done, and it is upon that basis that we feel, and only upon that basis can a fair determination be made.

Mr. Jordan: To which we object on the ground that they are obviously self-serving, and we would have no opportunity of cross-examination. Furthermore, they are entirely self-serving. They do not go to prove the facts stated there. We are entitled to cross-examine, and you can put somebody on.

Mr. Ferguson: I will withdraw them and prove them by competent evidence.

Mr. Jordan: You would not expect us to accept as true everything that was recited in the minutes.

Mr. Ferguson: No. I would expect you to agree that these were the minutes, and there is a prima facie presumption that the minutes correctly set forth the proceedings of the board of directors.

Mr. Jordan: I know, but the presumption does not go to the extent that everything stated in those minutes, is true.

The Court: You want to introduce all of the minutes, as I understand? [565]

Mr. Ferguson: That is correct.

The Court: You do not want to encumber the record with all of the minutes, do you?

Mr. Ferguson: No, I will make my offer in the regular way. Mr. Levit, will you take the stand?

MORRIS LEVIT,

recalled for the Defendants and Petitioners.

Mr. Ferguson: Q. You have already been sworn, Mr. Levit? A. That is right.

Q. Mr. Levit, in your examination by Mr. Jordan you referred to conversations, very generally to the fact that you had had some conversations with Mr. Moores and Mr. Bassick and others, with respect to your compensation. I do not believe you went into that very fully. Can you tell us how many conversations you had with Mr. Moores, or Mr. Bassick?

A. Well, I would say that I probably discussed the matter with Mr. Bassick twenty times.

Q. Over what period of time?

A. Well, from the time that the reorganization

(Testimony of Morris Levit.)

plan was first put into effect up to the time of the sale.

Q. Where were those conversations held?

A. In our office in San Francisco.

Q. Was anybody else present, do you recall?

A. I think Mr. Hyland was present at some of the conversations.

Q. What were those conversations?

Mr. Jordan: Just a moment, now, I think in the first place the time and place of the conversations should be stated, and in the second place I think any conversation of that sort would be entirely self-serving. We were not present, and we certainly [566] would not be bound.

Mr. Ferguson: If your Honor please, one of the allegations of our petition was denied, and therefore put in issue the fact that these officers agreed to work at substantially less than the compensation they had been receiving, and the reason for their so agreeing was that they were promised additional bonuses in cash and in stock for so working. I think it is very material to determine whether or not during the five years they performed services it was in reliance upon the fact that they would be given bonuses and stock.

The Court: I think the first part of Mr. Jordan's objection is good, that is to say, as to the identification of the time and place.

Mr. Ferguson: I will try to do that, too.

(Testimony of Morris Levit.)

The Court: All right, the objection is overruled.

Mr. Ferguson: Q. Can you tell us when the first conversation was held?

A. My first conversation in regard to compensation with Mr. Bassick was almost immediately after he came in as a receiver, which I think was in 1934; he called me into his office and told me that he was extremely anxious that I should stay on and assist them particularly in the same position that I held for so many years before, and I told him that I was not at all sure that I wished to do that, for the reason that I had accepted two reductions in salary during Mr. Behneman's receivership, and I felt that my salary should be reinstated to what it was originally. He said if I felt that way about it he just felt he could not go on, that he wanted me to stay there, he wanted me with him, and he also said if we were going to make a success of the business there would probably be still further cuts in salary, but he assured me if I would consent to any further cut, [567] just as soon as the business got to be a going concern and we were again solvent, that he would personally see to it that I was compensated in an amount sufficient to take care of all of the cuts I had taken, all of the reductions in salary, and I voluntarily consented then to let him cut my salary another hundred dollars a month. I do not remember the month he came in, but I think it was in April of 1934.

Q. It was in March, 1934.

A. In March.

(Testimony of Morris Levit.)

Q. You say you had other conversations with him. Can you remember when the next one was?

A. Probably a year after that.

Q. That would make it in March or April, 1935?

A. I would think so, yes.

Q. Where was that conversation held?

A. I asked him if he could see his way clear to——

Q. Where was this conversation?

A. All of these conversations were held in our San Francisco office, mostly in Mr. Bassick's office.

Q. Was anybody else present at this conversation?

A. Not that I know of.

Q. State the conversation, please.

A. I called his attention to our previous meeting in regard to my salary, and he stated that matters had not progressed so that anything could be done, and I more or less agreed with that, too. That was prior to the reorganization.

Q. Now, did you have any other conversations prior to that?

A. Well, immediately after the reorganization I discussed the matter with him again.

Mr. Jordan: Just a moment, as far as any conversation after the reorganization—I presume that would be a time that Mr. Bassick became president of the company, and after the company [568] came out of the 77B proceedings, is that correct, Mr. Ferguson?

(Testimony of Morris Levit.)

Mr. Ferguson: I do not imagine it would be, because he continued to be trustee for some number of months afterward, and if it was immediately after the plan was confirmed he probably still was trustee.

Mr. Jordan: If this conversation took place before January 27, 1937 then I have no objection.

A. This was in 1936, I should say, it was immediately after the reorganization plan was approved by the Court. I went to Mr. Bassick and spoke to him about what my participation would be in the stock distribution, that is, that portion of the stock which was to be reserved for the main employees, and he told me that it would be very substantial whenever the time came that the company was again solvent and the stock was distributed. After that time I talked to him repeatedly about it, and particularly after the middle of the year 1939, I told him that I was convinced that the company was solvent at that time.

Mr. Jordan: Just a minute now, that is coming to a conversation regarding which no foundation has yet been laid, and I am going to object to anything Mr. Bassick may have said after he became president of this company, and it was out of the 77B proceeding, upon the ground that no foundation has been laid to show that Mr. Bassick had any authority to make any representation of this kind on behalf of the corporation.

The Court: That was after reorganization?

Mr. Jordan: After the company had come out

(Testimony of Morris Levit.)

of reorganization on January 27, 1937, when your Honor entered the final decree.

The Court: It was still operating under the plan, was it not?

Mr. Ferguson: That is correct. [569]

The Court: Overruled.

Mr. Ferguson: May we have that conversation which you say was in the middle of 1939?

A. About the middle part of 1939 I told Mr. Bassick that I felt the company was now solvent, and I thought a stock distribution should be made at that time, at least a partial stock distribution, and he told me that he would consult with the board of directors, discuss the matter with them fully, and see what could be done. I had repeated conversations with him after that up to the time of this sale. I was continually assured that the distribution would be made just as soon as they could do it, or just as soon as the directors felt that it was the proper time to do it. I also had a conversation with Mr. Moores, who was vice-president of the company.

Q. Before we get to Mr. Moores, might I also ask in connection with any of your conversations with Mr. Bassick did you have any conversation regarding cash bonuses?

A. Yes, I had a conversation regarding cash bonuses.

Q. Can you fix the time?

A. As soon as Mr. Bassick got there, which was

(Testimony of Morris Levit.)

in 1934, and probably once or twice after that, before the reorganization. Then during the reorganization I received a cash bonus almost every year. It was always known that I was to be compensated at the end of the year with further consideration than my salary.

Q. Now, you say that you discussed this matter with Mr. Moores. Did you discuss it with him once, or more than once?

A. I discussed it with him at least half a dozen times.

Q. Can you tell us when the first time was?

A. The first time I discussed the matter with Mr. Moores was immediately after the reorganization plan went into effect.

Q. That would be sometime in 1936?

A. That is right. [570]

Q. Where was that conversation held?

A. I think that was held in our office.

Q. Who was present, if you recall?

A. I could not recall who was present.

Q. What was the conversation?

A. I asked him to explain the proposed stock distribution, and he gave me about the same explanation that Mr. Bassick did.

Mr. Jordan: Just a moment, if your Honor please, I think we should have the witness' recollection of the conversation that took place, and at this time I am going to renew my objection that no

(Testimony of Morris Levit.)

proper foundation has been laid to show Mr. Moores had any authority to make any representation.

The Court: Overruled.

Mr. Ferguson: Q. Be as specific as you can, Mr. Levit.

A. It seems to me I met Mr. Moores in the entrance room of our office; he came in to see Mr. Bassick, who was busy, and we had a discussion right out there, and he assured me that when the proper time came the stock would be distributed and that I would receive a substantial amount of it. Then after the middle of 1939 I had several conversations with him in regard to it.

Q. Let us see if we can fix the time a little closer.

A. I could not tell you definitely. I know I talked to him half a dozen times about it, but I would not want to say what month it was, or where it was. I talked to him several times in the bank, I talked to him on the streets when I would meet him, call his attention to the fact that I thought the stock should be distributed, and he more or less agreed with it, but said they were not quite ready at that time to do it, it would be done later on. [571]

Q. Anything said about who would get it when it was distributed?

A. No, he did not. He told me I would receive a substantial amount of it, but I did not know who else was going to get it.

(Testimony of Morris Levit.)

Q. In any of your conversations with Mr. Moores did you mention the subject of cash distribution as well as stock distribution?

A. I remember going over to Mr. Moores and telling him I had received a cash distribution, and used to tell him I appreciated it very much, also that I hoped it would continue.

Mr. Ferguson: That is all.

Cross Examination

Mr. Jordan: Q. I think that the first conversation of the twenty or thereabouts conversations that you had with Mr. Bassick on the subject of your compensation, Mr. Levit, took place in 1934; that was when Mr. Bassick was receiver.

A. Yes, early in 1934.

Q. And then at that time he told you he wanted you to stay and he assured you that as soon as the business become a going concern—I think those were your words—that you would be entitled to and would receive additional compensation.

A. That is right.

Q. That being in 1934, that was before the company had become involved in the corporate reorganization proceeding?

A. That was during the receivership, Mr. Jordan.

Q. During the receivership, the State receivership? A. That is right.

Q. So that the compensation that was promised

(Testimony of Morris Levit.)

you at that time was in the nature of cash, was it not? A. That is right.

Q. That was the sole thing that your discussion had reference to? A. That is right.

Q. There was no talk at that time that you would ever receive [572] any stock under the circumstances that you did ultimately receive it?

A. That is right; the matter of stock did not come up until the development of the reorganization plan.

Q. So that the meeting you had with him in 1935, in March or April, during which a similar conversation took place, only dealt with the subject of additional monetary compensation?

A. That was in March or April of which year?

Q. 1935. A. That is right.

Q. And then the next time you met or talked to him about this, as I understand it, was in 1936—no,—I believe we went over to 1939. A. Yes.

Mr. Ferguson: No, he testified immediately following the plan in 1936.

Mr. Jordan: As far as your 1939 conversation was concerned, you told Mr. Bassick that you wanted some of these 2212½ shares of stock held by the trustees? A. Yes.

Q. And Mr. Bassick represented to you that you would get that stock as soon as the proper time came—I believe those were your words as I wrote them down—as soon as the proper time arrived for the board to distribute them.

(Testimony of Morris Levit.)

A. Something to that effect, yes; he said he would take it up with the board of directors.

Q. Did he tell you, in making that statement, elaborate on what he considered to be the proper time? A. No.

Q. Or what the board considered to be the proper time? A. No, he did not.

Q. You had a talk also with Mr. Moores shortly after the plan went into effect at the office?

A. Yes.

Q. And Mr. Moores, according to your testimony, also assured you that at the proper time you would have some of this stock [573] in a proper or substantial amount?

A. In a substantial amount.

Q. Did Mr. Moores tell you at that time what he considered, or what the board of directors considered would be a proper time?

A. No, that was not discussed with him.

Q. In 1939 you had another talk with Mr. Moores and at that time he told you upon your inquiry about the stock that the board was not quite ready?

A. He said they were not ready to make the distribution at that time.

Q. Did he say when they would be ready?

A. He did not mention any definite time, he said it would be done just as soon as they thought it could be done, but he did not say when it would be.

(Testimony of Morris Levit.)

Q. He did not tell you under what circumstances the board would consider it proper for it to distribute the stock? A. No, he never told me.

Q. Now, you told us about all the conversations that you had on the subject of distribution of the stock to yourself?

A. Well, I have only told you about the conversation that I had with the other members of the company, but the matter was discussed with other persons that are members of the organization.

Q. My question was not properly termed. What I had in mind was you have told all of the conversation that you had with any officers or directors of the company with respect to issuing stock to you?

A. In so far as I can remember. I know I had very frequent conversations with regard to it.

Q. Those conversations, to the best of your recollection, all took place in the company's office?

A. No. The conversations with Mr. Bassick took place in the office of the company.

Q. And Mr. Moores?

A. Once or twice with Mr. Moores in the [574] company's office, several times in his office in the Bank of California, and I think on one occasion I met him on the street and discussed it with him.

Q. But those meetings were casual meetings, in the sense that you meet and discuss this subject, is that correct?

(Testimony of Morris Levit.)

A. No. I went particularly to see him on *almost* of these occasions to discuss the matter with him.

Q. Let me ask you this: Did you ever appear before the board of directors of the Hendy Company at a formal board meeting, for the purpose of discussing with the board a distribution to you of any of the stock?

A. No, I did not. I was entirely willing to leave it to Mr. Bassick and Mr. Moores.

Mr. Jordan: That is all.

The Court: We will continue the trial until tomorrow morning at 10:00 o'clock.

(An adjournment was here taken until tomorrow, Thursday, September 25, 1941.) [575]

Thursday, September 25, 1941—10:00 o'clock A. M.

The Court: You may proceed in *Shores v. Hendy Realization Company*.

Mr. Ferguson: Yes, your Honor. Mr. Hyland, will you take the stand?

E. M. HYLAND,

recalled for Defendants and Petitioners.

Mr. Ferguson: Q. Mr. Hyland, you have been sworn before? A. Yes.

Q. In your examination by Mr. Jordan you referred briefly to the fact that you had had various

(Testimony of Elmer M. Hyland.)

conversations with Mr. Moores and Mr. Bassick regarding your compensation as an employee of the company, and as an officer. Will you tell us when the first of those conversations was had, and with whom?

A. The first conversation was with Mr. Bassick at the Sunnyvale plant in the early part of 1936, prior to the reorganization plan, at which time he discussed with me various phases of the plan, and said that the work would include certain stock considerations for the managing directors of the company. Then later, I would say in December of 1936, we again discussed the matter, and I wanted to know whether or not I was to be included in that, and he assured me that I was to be included as one of those who received the stock. In 1937 I again discussed the matter with Mr. Bassick, in a general way, and he again told me that the stock ultimately would go to the employees, which included myself.

In the early part of 1938 I went to Mr. Bassick and told him I had been offered another position in the East Bay District to manage a plant, and the salary at that time was to be greatly [576] increased over what I was getting from the firm, and asked him his advice, and he assured me that, he advised me to stay with the company, because he thought that things would look up, and the prospects at the plant were good, and said that if I would stay with the company he was sure I would

(Testimony of Elmer M. Hyland.)

be well taken care of, and would not lose anything. And that same year, about December——

Q. Was that 1937?

A. 1938. In December of 1938 I was in Denver on firm business, and was again approached by another company that was doing business in Denver, a large manufacturing company, and they wanted to open up a branch on the coast, particularly in San Francisco or the East Bay, and the president of the company at that time offered me a real interest in the new company, as well as a substantial salary.

Q. When you say a substantial salary, you mean an excess in the salary you were getting here?

A. Yes. In fact, he offered me \$12,000 a year, and I was quite impressed with that offer, and I left the impression that I would accept it, although I said I wanted time to think it over, and I then talked it over with Mr. Bassick, and he again assured me that he had been in conference with the various members of the board of directors, and they all felt that we were making real progress, and that I would not lose anything by staying with the company, and that I was needed in that position of running the plant. I took the matter under advisement, and then went to see Mr. Moores, at the Bank of California, and he also——

Mr. Jordan: Pardon my interruption, but when was this? A. About December, 1938.

Q. The end of December, 1938?

(Testimony of Elmer M. Hyland.)

A. Yes, I asked Mr. Moores' advice [577] then, of the Bank of California, and he spoke very encouragingly of the prospects of the company, and while he did not ask me to stay he felt that I would not be losing money by remaining with the company.

The Court: Q. You had been with The Joshua Hendy Company how long?

A. I had been with the company thirty-three years. I started just after I got out of college, and I went through the various phases of the plant, as a machinist, and in the foundry, and through the various positions. In 1939 and 1940 I had various conversations with Mr. Bassick, because, frankly, I wanted to have the assurance and bring it more or less up to date, that I was going to be properly compensated, because I was working, and working hard, at a very low salary, and I did not want to go on without that assurance, and I kept bringing this matter up numerous times. In fact, Mr. Bassick wrote me letters confirming our conversations, that I would be properly taken care of, and I kept those letters, and in fact last night I looked for them, and I have filed them so carefully that I could not even find them myself. I still think I can locate them on further search.

Mr. Ferguson: Q. You mentioned that in the first one or two conversations the distribution of stock was mentioned. In the subsequent conversations was stock mentioned?

A. Yes, stock was always the main considera-

(Testimony of Elmer M. Hyland.)

tion; there was no direct promise of any cash, but the inference was that we would receive the stock as the equivalent, so that the salary would be properly adjusted.

Q. Now, you referred to a conversation with Mr. Moores in December, 1938, about distributing stock. Did you have any conversation with Mr. Moores prior to December, 1938?

A. Yes. I believe my first conversation with Mr. Moores was in the latter part of [578] 1936. I had been approached by a member of the Hendy family to purchase some stock, and I went to Mr. Moores to ask him his opinion as to the value of that stock, and he told me that as of that date it had no value, and he advised against paying anything for it, and as a result I did not purchase the stock.

The Court: Q. When was that?

A. That was in the latter part of 1936, several months after the reorganization. I also approached Mr. Moores in the early part of 1938, when I had the East Bay offer, and he then mentioned that the stock would be distributed and I would receive my share at the proper time. He never at any time committed himself as to the quantity, or when the stock would be distributed. I also talked with Mr. Moores on more than one occasion in 1939 and 1940, I do not remember the date, frankly, but I was never discouraged from the fact that I would receive my stock, and he expressed himself on one occasion that the members of the board of directors were jointly

(Testimony of Elmer M. Hyland.)

in favor of the progress that had been made, and that I would be properly rewarded. In 1939 Mr. Price, also a member of the board of directors, called at the plant and looked over the work in progress, and expressed himself as being highly pleased with the progress that had been made.

Mr. Ferguson: Q. Do you recall any other conversations to which you did not testify?

A. No, I think that that covers the principal conversations.

Q. Now, you mentioned last night searching for some correspondence that you had with Mr. Bas-sick. As a matter of fact, I asked you prior to that to see if there was some corporate correspondence?

A. Yes, and I again looked last night.

Q. At that time you found one of the letters, although you told [579] me there was more than one—but there was one you could find?

A. That is right.

Mr. Jordan: Are you going to offer the letter?

Mr. Ferguson: As soon as he identifies it.

Q. I hand you a document dated October 13, 1937, and ask you if that is one of the letters that you did find.

A. Yes, it is.

Q. That was received by you on or about the date it bears date?

A. Yes.

Mr. Ferguson: If your Honor please, I now offer this letter in evidence as Petitioner's Exhibit next in order.

Mr. Jordan: I will object to the introduction of

(Testimony of Elmer M. Hyland.)

this letter in evidence upon the ground that it is self-serving and hearsay; we have no opportunity to examine Mr. Bassick; and upon the further ground that there has been no foundation laid to show that Mr. Bassick, presumably writing this letter as president of the company in October, 1937, had any authority from the board of directors to make any commitment or promise to Mr. Hyland.

The Court: It has been testified to the effect that this matter was discussed before the directors. When I say "this matter," I am not referring particularly to any compensation to this witness, but to the distribution of stock to employees, etc. Let me see the letter.

Mr. Jordan: There has been, I believe, testimony that there was this discussion between various directors, but I do not believe there is any testimony of a formal discussion.

The Court: What is your reply to the objection, Mr. Ferguson?

Mr. Ferguson: My reply is this, if your Honor please, that Mr. Bassick, who was president of the corporation, had authority, [580] and I think that was within the implied powers of the president to discuss the matter, and there has been testimony, as the Court pointed out, that the board of directors informally discussed this matter.

The Court: What is the date of that?

Mr. Ferguson: October 13, 1937. If your Honor please, it is alleged in the petition that under the

(Testimony of Elmer M. Hyland.)

plan of March 24, 1936, this stock was to be distributed to the managing officers.

The Court: The plan, itself, provides that the stock shall be distributed by the board to the managing officers as a reward for successful rehabilitation of the company's affairs. The objection is overruled.

Mr. Ferguson: If your Honor please, in view of the fact that the court looked at the letter, may it be deemed read?

The Court: Yes.

(The letter was marked "Respondents' Exhibit A.")

Mr. Ferguson: Q. Now, Mr. Hyland, also in Mr. Jordan's examination you referred to the fact that you had been a great many years with the plant and during the period involved subsequent to reorganization were plant superintendent, also bore the title "Vice-president in charge of manufacture." Can you tell us whether the condition of the plant at the time that the plan of reorganization went into effect was the same as the condition of the plant at the time that the plant was sold?

Mr. Jordan: I think that question is too indefinite, and that it probably calls for the opinion and conclusion of this witness.

The Court: He is qualified to testify. He surely must know something about it.

Mr. Jordan: I have no doubt about that, but I am merely point- [581] ing out to your Honor that the

(Testimony of Elmer M. Hyland.)

word "condition", I do not know exactly what that means.

The Court: You mean physical condition?

Mr. Ferguson: The physical condition.

The Court: Very well.

Mr. Ferguson: I will amend the question and will say, "physical condition."

A. The plant as of 1934, when Mr. Bassick took charge,—

Mr. Jordan: Just a moment, I think the question was in 1936, at the time of the plan of reorganization.

A. That is true.

The Court: This is preliminary, I suppose?

A. That was just preliminary, in 1934. May I answer it that way?

Q. Yes, go ahead.

A. In 1934 the plant was in a deplorable condition. In fact, when Mr. Bassick took charge there was not a man working on any profitable job in the organization. It was simply flat. That was the condition when he came to the plant for the first time, all of the tools, when I say "all of the tools," I should say practically all of the tools were so run down that they were not capable of producing any work with sufficiently close tolerances to meet the customers' requirements. From 1934 until 1936 some progress was made toward rebuilding those tools and fixing them up, but there was very little money available, therefore not much progress was

(Testimony of Elmer M. Hyland.)

made. When the reorganization plan became effective in 1936 we really started in then to overhaul the plant and tools, as well as the building, and I think I can safely say that 90 per cent. of the machine tools in that plant were overhauled and the expense charged as an operating expense of the plant, and also the buildings were [582] in such shape that they were really unsafe for the overhead electrical cranes to travel in the building, and necessitated reinforcing the building as well as the foundation, all of which expense was absorbed as operating expense of the plant.

Mr. Ferguson: Q. Notwithstanding that a substantial part of it, as you have indicated, was restored as an operating expense, it would not increase the capital stock assets, I mean things that were actually capitalized, I mean some major items of machinery that were added?

A. That is true.

Q. Will you describe those, briefly?

A. Well, referring particularly to the tools that were charged to capital assets?

Q. Yes, I believe the books will reflect that some improvements to which you referred were capitalized, although the bulk of it was not.

A. Well, I do not think I am in a position to say just what tools were charged to capital assets, because I did not have anything to do with the bookkeeping, but I do know that I passed on the expense, both of labor and material of rebuilding

(Testimony of Elmer M. Hyland.)

and repairing, and I know they were charged to operating expense of the plant.

The Court: Were any new tools furnished?

A. Yes, we purchased three machine tools, one for a screw machine, a 7-foot drill press, and a very large vertical boring mill; it was a very expensive tool, and was necessary to secure other work that we had in prospect.

Mr. Ferguson: Q. Do you know what the cost of those, the drill press and the screw machine, etc., was, have you any idea?

A. I have an idea, but I am afraid it would be so approximate——

Q. Your theory is that the books would be better evidence in that respect?

A. I would rather leave it to the books.

Q. One further question: Do I understand, then, from your tes- [583] timony, that the physical condition of the plant at the time of the sale in 1940 was substantially improved from that which existed at the time the plan was confirmed in 1936?

A. Yes. I intended to cover that by my explanation.

Q. I think you did. That is all.

The Court: Did I understand you to say you were the manager of the plant?

A. Yes, I was considered as plant manager and vice-president, of manufacture.

Q. As plant manager, were you at the plant all the time?

(Testimony of Elmer M. Hyland.)

A. All the time with the exception of occasional trips where mechanical knowledge was needed.

Cross Examination

Mr. Jordan: Q. Mr. Hyland, I think that the first conversations that you testified to with Mr. Bassick, regarding your compensation, took place at the Sunnyvale plant sometime early in 1936, or before the confirmation of the plan of reorganization on March 24, 1936.

A. I do not think that I referred particularly to any compensation early in 1936. I believe that what I intended to convey was that Mr. Bassick explained to me then that the plan was then being started for the reorganization, and it provided for a stock distribution. Perhaps I did not make myself perfectly clear on that point.

Q. That was the contemplated stock plan that was to be incorporated in the plan of reorganization if it was confirmed by the court?

A. That is right.

Q. Now, just so we will have the continuity of this matter, you went back to 1934 and described the condition of the plant at that time, and of course you had been with the company for many years up to that point. What was your salary per month in 1934?

A. I think I previously testified that I was not [584] positively sure, but when I went in, when Mr. Bassick came in in 1934, approximately April, I agreed to take a salary equivalent to what I was

(Testimony of Elmer M. Hyland.)

getting as assistant plant manager before that time, working part time; in other words, I had previously, on account of the condition of the plant, only been working part time, for which I received approximately \$250 a month, and I agreed to continue on as manager of the plant *as* the same rate that I had been getting just prior to that date.

Q. Between 1934 and 1936, did you receive increases in salary over the \$250?

A. My memory is not very clear on that, except my impression that I did receive some very small increase, but I don't remember just what that was.

Q. Now, will you tell us the maximum salary that you ever had received from The Joshua Hendy Iron Works prior to March 24, 1936?

A. I can tell you only so far as I have received monthly, and that was \$350, plus additional bonuses that I frankly have no knowledge now of, just how much they amounted to.

Q. Could you make an approximation of what they amounted to, the average of the entire five years' period, a month?

A. I would rather average that, but this is only a guess, you understand—I would think they would average an increase of about \$1000 or \$1200 a year.

Q. So that would have been your top salary prior to March, 1936, an average inclusive of bonuses and salary of between \$400 and \$450 a month?

A. I would think that, yes.

Q. That, of course, was not continuously prior

(Testimony of Elmer M. Hyland.)

to March, 1936, by any means, because you testified in 1934 you were receiving \$250.

A. That is right, but you understand that prior to 1934 I was not plant manager, I held lower positions.

Q. I also understand that you had never been employed by any other [585] company during your work life, practically, than The Joshua Hendy Iron Works? A. That is right.

Q. Now, in December, 1936, you again discussed this matter of compensation with Mr. Bassick, and Mr. Bassick said that you would be included among those who would receive stock? A. Yes.

Q. And that was after the plan had been confirmed, of course, by some months? A. Yes.

Q. Now, at that time did he tell you when you could expect to receive that stock, or make any definite commitment, or was it merely an assurance in effect that at some future time if the stock was distributed you would be taken care of?

A. That was the extent of the promise.

Q. But as I understood your testimony there was a definite assurance around the end of December, 1936, that at a future date the stock would be distributed?

A. I would hardly like to go as strong as that. I think as early as 1936 the promise was that if and when the stock was distributed then that I would receive my just share; I do not think it was ever definitely promised earlier than that.

(Testimony of Elmer M. Hyland.)

Q. At that time, when that representation was made to you in December, 1936, when you were told that if and when the stock was distributed that you would get in on it as one of those who would be entitled to distribution, did Mr. Bassick tell you what condition the company would have to reach financially before the board would be disposed to distribute that stock?

A. I do not think that angle was discussed. I do not think he mentioned that.

Q. In other words, then, as I understand it, Mr. Bassick did not relate to you any circumstances or conditions which would have to occur as a prerequisite to your receiving a portion of [586] this trustee's stock?

A. I think that is correct.

Q. You said that in December, 1936, there was only this when and if promise, and you said at some later point there was a definite promise, assurance that the stock would be distributed. Do you now recall the approximate date when that positive assurance was made to you that you would receive some stock?

A. Well, the positive assurance came in 1939 and 1940, but as early as December, 1938 Mr. Bassick expressed himself as very favorably inclined to believe that there would be a distribution.

Q. He expressed himself as favorably inclined, but that was still not a positive assurance?

A. I do not think that there was any positive assurance in 1938.

(Testimony of Elmer M. Hyland.)

Q. Now, in 1939 or 1940 who made you the positive representation that you would receive a portion of that stock?

A. Both Mr. Bassick and Mr. Moores.

Q. Now, with reference to 1939, will you state the circumstances under which, during that year, either Mr. Bassick or Mr. Moores positively told you that you would receive stock?

A. In answer to my direct inquiry, when I took the matter up with Mr. Bassick at the plant on several occasions, and I would not want to point just to the particular month or just the occasion, it happened so often, that the matter was taken up.

Q. This was in 1939?

A. In 1939 and 1940, both.

Q. As I understand, then, you were positively assured by Mr. Bassick on several occasions, both in 1939 and 1940, that you would receive the stock?

A. Yes.

Q. Or at least some portion of it?

A. Yes, receive some portion of it.

Q. Did he ever at the same time tell you when you could expect to receive that stock?

A. No, he did not. [587]

Q. Did he ever, at any one of those occasions, ever tell you what conditions would have to be accomplished or what financial condition the company would have to be in before it would be possible for you to receive a portion of the stock?

A. No. I can recall now that in the conversa-

(Testimony of Elmer M. Hyland.)

tions with Mr. Bassick, both in 1939 and 1940, he asked me to have patience, that he wanted me to have the same patience and confidence in the board of directors that he had, as he felt certain that they would fully live up to their promise that both he and I would be properly taken care of.

Q. Summing this up, as I understand your answer around the latter part of 1936 and thereafter you did receive assurances from Mr. Bassick and Mr. Moores that when, as and if the board decided to distribute this stock that you would receive a portion of it? A. That is correct.

Q. And that in 1939 and 1940 there were numerous occasions when Mr. Bassick positively assured you that you would participate in the stock distribution, but did not tell you when you could expect that distribution, or what circumstances would have to take place, or what would have to occur before the distribution would be made. Does that sum it up?

A. That sums it up. Mr. Moores also made this assurance in 1939 and 1940.

Q. I presume that, in substance, his assurances were of the same character as Mr. Bassick's?

A. That is correct.

Q. But Mr. Moores became no more definite than Mr. Bassick as to when or under what circumstances you could expect distribution?

A. That is right.

(Testimony of Elmer M. Hyland.)

Q. Now, were Mr. Moores and Mr. Bassick the only members of the board with whom you discussed this subject? A. Yes.

Q. And I take it that you never appeared at a formal board meeting [588] of The Joshua Hendy Iron Works? A. Never during that period.

Q. You never received from that board a formal assurance, either verbally or written, that you would at some future time receive the stock?

A. No, I felt that my contact in all of those matters was with Mr. Bassick, as President, and Mr. Moores, as Vice-president.

Q. I think you said something, Mr. Hyland, about, in these conversations with Mr. Moores and Mr. Bassick in connection with these assurances, that the stock was always the main consideration in your mind: is that correct?

A. That is correct. However, I was given to understand that the deficiency in the salary would be properly adjusted, and I always understood that as being principally through the distribution of stock.

Q. You were then considering the prospect of the distribution of the stock to you as the very primary and main consideration rather than the payment of additional compensation in the form of money?

A. I was hopeful of the stock distribution because of my long connection with the plant, and I

(Testimony of Elmer M. Hyland.)

wanted to be a substantial owner in that organization.

Q. You felt that you had been and were being underpaid for your services during the period following the confirmation of the plan and the time during which you had these various conversations with Mr. Bassick and Mr. Moores?

A. I did not only think it, but I definitely knew it, because I had offers of a position where I could go and get more than what I was getting.

Q. But notwithstanding those offers, and I think one amounting in 1938 to \$12,000 a year, notwithstanding those offers you nevertheless stayed on with the Hendy Company in the expectation that you would some day participate in the stock distribution? [589]

A. That is correct, stock, or cash, or both.

Q. That is your answer, even though you have admitted that the time when you would receive the stock was indefinite and uncertain, and the amount of stock that you would receive was indefinite and uncertain?

Mr. Ferguson: I think that is argumentative, if your Honor please, and immaterial.

The Court: Sustained.

Mr. Jordan: Q. It is true, is it not, Mr. Hyland, that on January 28, 1937, your salary was established by the board of directors at \$400 a month, was it not?

A. That I do not remember, the records will show.

(Testimony of Elmer M. Hyland.)

Mr. Jordan: Will it be stipulated that is a fact?

Mr. Ferguson: If that is what the answer to the interrogatories shows that is a fact.

Mr. Jordan: But the answer to the interrogatories does not list it month by month, but by years.

Mr. Ferguson: That appears to be correct, Mr. Jordan.

Mr. Jordan: In any event, Mr. Hyland, it is true, and if you cannot remember this I am sure that we can get it by stipulation, in fact I think it is already in, but I want to address it to you: You had received from March 24, 1936 to December 31, 1936 \$3500?

A. Yes.

Q. And that would have been approximately \$400 a month for the nine months' period. You did receive for the year ending December, 1937 \$4775?

A. Yes.

Mr. Ferguson: That is so stipulated, Mr. Jordan.

Mr. Jordan: And the total for 1938 \$6000, \$6700 for 1939, and \$25,241.57 for 1940?

Mr. Ferguson: Those figures are all stipulated to, Mr. [590] Jordan. Those are salaries as well as cash distributions.

Mr. Jordan: That is right, but I want to bring out again that the total compensation received by Mr. Hyland during this period was \$46,216.57.

Q. Now, let us get to the physical condition of the plant in 1934. You said, Mr. Hyland, that the plant was in very bad shape at that time, and was

(Testimony of Elmer M. Hyland.)

run down, and badly in need of fixing up. As a matter of fact business was very poor at that date, was it not? A. Very bad.

Q. 1934 was the low ebb year so far as business generally was concerned, and that was true with the foundry and machinery business?

A. Yes, particularly that plant, it was practically flat.

Q. And the orders were very few and money was very scarce? A. That is true in 1934.

Q. There was not any money to fix the plant. That is about the substance of it, is it not?

A. Well, the plant should never have needed fixing up; had it been properly taken care of progressively, year by year, it would have been entirely unnecessary in any one period to have started in to overhaul 90 per cent. of the tools as well as the building.

Q. From 1934 to 1936 there were some improvements made in the plant, *physically*?

A. Yes, not to any great extent, though.

Q. To some extent? A. To some extent.

Q. And business conditions generally were improving during that period, were they not?

A. Yes.

Q. There were more orders coming in and there was more activity at the plant?

A. That is right.

Q. The overhauling of the building and the equipment and machinery on a more extensive scale

(Testimony of Elmer M. Hyland.)

began, as I understand it, [591] after the time of the confirmation of the plan of reorganization?

A. That is right.

Q. And from the confirmation of the plan on through to the date of the sale of the plant the condition of the business, generally, was pretty good, was it not?

A. Yes, there was a continual improvement, I would say, from 1936 on.

Q. That is, business conditions generally?

A. I would not say business conditions generally, but I think that by reason of the efforts that were exerted by the management additional orders were secured; the orders did not pour in, it was a case of going and get them.

Q. And you have been connected, or had been, with The Joshua Hendy Iron Works for a great many years, and you have seen it rise and seen it decline, and so on throughout the years. Did you feel, in the light of your familiarity with the business through those years, and your knowledge of the way things were going in the fall of 1940, that the business could have been continued profitably under the same management?

A. Yes, that is my opinion.

Q. Those improvements that were made during the period following the confirmation of the plan, installation of machines, capital improvements, they were all sold with the plant, were they not?

A. Yes.

(Testimony of Elmer M. Hyland.)

Q. In other words, the whole operations down there, the whole plant was sold lock, stock and barrel? A. Yes.

Q. Just a couple of more questions, Mr. Hyland. Do you know where the money came from that was used to buy these capital improvements, machinery, tools, etc.?

A. I do not, that was out of my line.

Q. Did you have any inventory on hand at the plant at the time that [592] the plan was confirmed in March, 1936—you should be familiar with that?

A. Yes, we had an inventory.

Q. Isn't it true that a great deal of that inventory was sold subsequent to the confirmation, converted into cash somewhere around \$90,000 worth?

A. Well, I had nothing to do with the sale. We had certain materials on hand in the way of machinery that naturally we sold when we had the opportunity to add to our stock other lines and replace that which was sold.

Q. But it is true, is it not, that they did sell machinery subsequent to the confirmation of the plan? !

A. Well, we made every effort possible to sell any machinery that we had on hand for sale, and we were quite successful.

Q. That is what I want to get at. You made every effort and those efforts were rewarded and you did sell? A. Yes.

Q. A substantial amount of inventory and old machinery?

(Testimony of Elmer M. Hyland.)

A. I don't know about old machinery. When you say "old machinery" you are not talking about the plant equipment, that is tools that were installed. You are speaking of machinery that we had on hand for sale?

Q. Yes.

A. Yes, we did sell considerable of it.

Q. And machinery that was not operative, in the sense that you did not use it in the plant?

Mr. Ferguson: No, he has testified it was not plant equipment.

Mr. Jordan: Q. I will ask you this question: Do you understand what capital assets is?

A. Yes.

Q. Were any capital assets, as you define them, sold subsequent to the confirmation of the plan in 1936?

A. Yes, but they would be of a very small value. I believe that we sold one of the obsolete lathes.

[593]

Q. That had previously been in use at the plant?

A. That is correct.

Q. Then in addition you sold a substantial amount, did you not, of inventory on hand.

A. Yes.

Mr. Jordan: I think that is all.

Mr. Ferguson: No questions.

Mr. Jordan: Mr. Ferguson, would you like to stipulate to the total amount of money which was

(Testimony of Charles B. Moores.)

expended by the company following the confirmation of the plan for additions to the Sunnyvale plant and equipment?

Mr. Ferguson: I do not want to enter into any stipulation. We are going to bring the figures in and prove them by the accountant. If it is not then proved I will enter into a stipulation.

Mr. Jordan: Are you going to repudiate your sworn answers?

The Court: Do you wish to introduce those in evidence?

Mr. Jordan: Very well, your Honor. I will do that during the rebuttal.

The Court: That will save time.

CHARLES B. MOORES,

Recalled for Defendants and Petitioners.

Mr. Ferguson: Q. Mr. Moores, in your examination by Mr. Jordan reference was made only generally to conversations that you had with Mr. Bassick and Mr. Hyland and Mr. Levit. Can you tell us when your first conversations were held with respect to the distribution of stock or compensation of these officers or these employees, and by the way, with whom it was held, and where?

A. Well, you are speaking of the conversations with Mr. Bassick?

(Testimony of Charles B. Moores.)

Q. Suppose you take Mr. Bassick first, if you please, and can [594] you tell us when you had your first conversation with Mr. Bassick regarding his compensation?

A. Prior to his appointment as a receiver in the State Court case in March, 1934.

Q. Where was that conversation held?

A. It was held in the bank and in the office of The Joshua Hendy Iron Works, which was then at 200 or 300, Pine and Battery streets.

Q. What was the conversation at that time?

A. Well, when he first went in as Receiver and the auditor's examination was made it looked as if it was merely a matter of liquidation, and I had suggested to him that he take the position at a compensation of \$350 a month, and then the court would probably grant additional compensation when he proceeded with liquidation.

Q. Prior to that time had he ever been employed by the Bank of California?

A. No, he had not.

Q. Or, to your knowledge, by any of the other creditors?

A. No, I am sure he had not.

Q. When was your next conversation with Mr. Bassick?

A. It was very shortly after that when, as a result of his examination of the business affairs and the audit was made by Mr. Bourne——

Q. Mr. Bourne was a certified public accountant?

(Testimony of Charles B. Moores.)

A. A certified public accountant, he examined the books at the time of the death of the former receiver, Mr. F. J. Behneman, and Mr. Bassick advised me that he thought a better liquidation could be accomplished if the business could be continued to operate for a trial period of a year or two, he thought there was a possibility that it did have a going concern value, and if it did and there was an opportunity to sell it, that could be presented to the court.

Q. You have, of course, from that time up until the time of the sale, had numerous conversations with him, both with respect [595] to compensation and other compensation?

A. Frequently. I was in touch with him sometimes five or six times a week, and sometimes that many times a month.

Q. When was your next conversation with Mr. Bassick?

A. Well, in the conversation to which I just referred, when it was demonstrated or we were willing and considered it was advisable to continue for a trial period, the compensation I believe then was agreed upon at \$600 a month. That was plus whatever receiver fees were allowed, of course. I was merely representing a creditor.

Q. That was during the State receivership?

A. Yes.

Q. Did you have any other conversation regarding compensation prior to the time that a peti-

(Testimony of Charles B. Moores.)

tion was filed under the 77B proceeding here involved?

A. Not prior to the filing of the petition, no.

Q. Subsequent to the filing of the petition did you have any conversation with Mr. Bassick regarding compensation?

A. Yes, before the adoption of the plan.

Q. Can you fix the date as definitely as you can?

A. It was the first quarter of 1936.

Q. Sometime in 1936 prior to the confirmation of the plan? A. Yes.

Q. Where was that conversation held?

Mr. Jordan: Was it the answer that it was in 1936, prior to the confirmation of the plan?

A. A month or two prior to the confirmation of the plan.

Mr. Ferguson: Q. Where was that conversation had?

A. It was held in the office of The Joshua Hendy Iron Works.

Q. Who was present, do you recall?

A. Mr. Bassick and I.

Q. What was the conversation?

A. The conversation related to the portion of the plan whereby half, or 2112½ shares of stock [596] was to be set aside for the benefit of the management.

Q. You are referring to that provision of para-

(Testimony of Charles B. Moores.)

graph 6G of the plan of reorganization then under consideration?

A. Yes and Mr. Bassick knowing, or presuming that I would be one of the directors nominated by the Bank of California, as a creditor, took the matter up with me as a representative of that particular creditor, and asked me what the distribution of stock meant, to whom was it going to apply, and I said that I believed——

Mr. Jordan: Just a moment, now. If your Honor please, I am going to object to any expression of opinion by this witness regarding the meaning of that term “successful rehabilitation” as used in the plan.

The Court: Sustained.

A. I am not speaking of rehabilitation.

Mr. Ferguson: Q. Can you tell us just exactly what the conversation was, omitting any expression as to your intention?

The Court: His opinion.

Mr. Jordan: Did the question relate to any inquiry about rehabilitation?

The Court: The witness has made the remark that it did not.

A. It had nothing to do with rehabilitation, it had something to do with the stock that was to be set aside, and what our attitude would be.

Q. You said what was to be done with it?

A. I said what my opinion would be if I was one of the directors.

(Testimony of Charles B. Moores.)

Mr. Ferguson: My question is, I am trying to elicit the conversation.

The Court: Q. State what you said.

A. I told him that as a director of the company I would consider that the stock was to be distributed to those people who were [597] active in the management of the company, and Mr. Bassick inquired as to whether that included him, and I said I thought it meant to all in the position of managerial authority, such as himself, and the sales manager, and plant manager, and engineer in charge of the plant, and it might develop that other people would during the course of operations come under that section, certain employees of the company.

Mr. Ferguson: Q. Was there anything further in that conversation?

A. Well, he asked me in what proportion it would be distributed, and I said that would be impossible to determine in advance of the rehabilitation.

Q. Now, did you have any further conversation before the confirmation of the plan, do you recall?

A. I do not recall any other.

Q. Did you have any conversation immediately following the confirmation of the plan with Mr. Bassick?

A. As to his compensation, yes.

Q. When was the first conversation?

(Testimony of Charles B. Moores.)

A. Immediately after the confirmation of the plan, I was a director of the company.

Q. Can you place the approximate time of this conversation you are speaking of?

A. Shortly after the adoption of the plan of reorganization, I believe in April, 1936; I was in frequent conversation with him in his office and he asked me then what was the intention with regard to his compensation, and I said in the present condition of the company we would appreciate it very much if he would accept the same salary that he had been receiving, which was \$600 per month.

Q. Was anything said at that time with relation to distribution of stock?

A. Yes, that eventually he could look forward to being rewarded by the distribution of stock.

Q. Was anything said about the condition on which it was to be [598] distributed?

A. Nothing definite.

Q. When was your next conversation with Mr. Bassick?

A. Well, after the close of business each year, when the financial statement for the previous year's period was available there was a periodical conversation with regard to compensation, and sometimes the month before the end of the year. I think toward the end of 1936 the matter of adjusting his salary and some of the others was taken up by him with me, and was submitted to the directors meeting, and I think they will appear in the minutes

(Testimony of Charles B. Moores.)

of the directors meetings. In 1937, after the annual report was available, he spoke to me again about his salary, and thought he was very much underpaid, and I agreed with him he had been underpaid, but I did not feel that the company was in a position to grant any definite commitment as to his fixed salary, that it had better await the result of each year's operation, that I felt sure that the directors would compensate him for what he had done in the past year. That was done in various years from time to time.

Q. As I understand, it was at least an annual talk as the end of each year's operations became available? A. Yes.

Q. Did you discuss it oftener than that?

A. I think my discussions with Mr. Bassick were replete with the idea, with the statement that he was very distinctly underpaid, in view of the fact his predecessor had received \$12,000 a year, and he was making a success of the business, and was receiving much less.

Q. During these conversations was discussion had with respect to the distribution of stock?

A. Yes, he asked when the stock was going to be distributed, and I told him that was a matter for the board, I did not think it was an opportune time to bring it up before the board. [599]

Q. When did you tell him that, if you can recall.

A. In 1936, 1937, 1938, the question of stock

(Testimony of Charles B. Moores.)

was brought out, and my point of view expressed to him that the stock had not any value if it was delivered to him then, it would be merely an idle gesture on our part, or on the part of the directors, but that when the stock developed a value it was time enough to discuss that. In 1939, when it was indicated that there was some value in the stock he brought that matter up again, and we called a meeting. I said when the stock had a value would be an opportune time, and it had an indicated value, but one swallow did not make a summer, it might have less value or no value at the end of the year. At the end of 1938 that fact had been borne out, there had been a loss in the operations, so that the stock at the end of 1938 had no value. As the year 1938 progressed there was work going on in the shop, a large job had been taken on on which a profit was indicated, but which had not yet been proven, but the interim statement rendered by the accountant for the company did indicate that there would be a value for the stock.

Q. That is, as I understand it, at the end of December, 1938, the balance sheet shows a loss for the year, there was work in progress for which payment had not been received the following year?

A. There was a job, and that, I think, ran about \$850,000, on which we would make a profit of \$150,000.

Q. Now, how about 1940, did you have any discussion with Mr. Bassick during the year 1940?

(Testimony of Charles B. Moores.)

A. I do not think I quite completed 1938.

Q. Pardon me. Will you continue?

A. In 1938 Mr. Bassick addressed a letter to Mr. McIntosh, Chairman of the Board of Directors of the Bank of California, stating that he felt a profit had been made.

Mr. Jordan: I think that letter, if we are going to [600] discuss it, would be the best evidence, and if it were here I would object to it on the same grounds as that last letter.

Mr. Ferguson: Perhaps instead of taking time now we will accumulate those letters and we can put them in in chronological order.

The Court: Mr. Ferguson, how many more witnesses will you have?

Mr. Ferguson: I believe one, perhaps two, after Mr. Moores.

The Court: How long will it take to close your case?

Mr. Ferguson: I think we can complete by tomorrow, if your Honor please.

The Court: The reason I am asking you is, it will be necessary because of other business to adjourn today at 3:00 o'clock. I would like to finish this case today or tomorrow.

Mr. Ferguson: I think that may be done. After Mr. Moores we contemplate calling an accountant from Mr. Forbes' office, with rescept to the actual figures shown on the books of the corporation, and it depends upon that examination whether addi-

(Testimony of Charles B. Moores.)

tional witnesses may be called or not. That is my present intention, if your Honor please.

Mr. Jordan: I see no reason why we should not be able to complete the testimony today.

Mr. Ferguson: No, I do not think so. Does your Honor wish oral argument in this matter, or prefer to have it submitted?

The Court: I do not know. It depends on what time we have when you finish the evidence. If we have time and you wish to make oral argument, I will be glad to hear it. If not, it may be submitted.

Mr. Ferguson: I might say for the Court's information, I [601] have here the other letters I propose to introduce in this connection.

The Court: Can you ask Mr. Moores some other questions and permit Mr. Jordan to go through them during the noon recess?

Mr. Ferguson: Perhaps I can. I can hand these to Mr. Jordan and I can go to Mr. Hyland.

The Court: You can read those during the noon hour.

Mr. Ferguson: Q. Leaving for the time being, Mr. Moores, the correspondence with Mr. Bassick and other conversations with him, and turning to Mr. Hyland, did you ever have any conversation with Mr. Hyand regarding his compensation?

A. Yes, I had conversation with him on one or two occasions at Sunnyvale and on one or two occasions in the office.

(Testimony of Charles B. Moores.)

Q. When was the first of those held?

A. Well, I listened to Mr. Hyland's testimony and I think his recollection of them is in accord with my recollection, if that will serve the purpose.

Q. Then at the first conversation with Mr. Hyland, what he said, is your recollection the same as Mr. Hyland's?

A. My recollection is very much the same as his. As a matter of fact, he recalled something to my memory that I had not recalled, which I now recall.

Q. Referring to all of Mr. Hyland's testimony, do you agree in his statements as to his compensation? A. I do.

Q. Do you have anything to add to his statement regarding compensation, or distribution of stock?

A. Well, there is something that did occur to me, I don't know whether it is a proper subject for me to bring up. He told me, after having left the employ of the Sunnyvale Company, the Joshua Hendy Iron Works, that he was offered a position with them at a higher salary than [602] he had got when he left, which was indicative of the fact that the position which he occupied was deserving of a much higher salary than he had ever received in the employ of the company. There was never any question in my mind, or any of the directors' but that all of the officers of the company were working for less than their position, such as they occupied, was worth.

(Testimony of Charles B. Moores.)

Q. Is there anything further you wish to add to Mr. Hyland's testimony regarding these conversations? A. No.

Q. Referring to Mr. Levit, you heard Mr. Levit testify on the stand? A. Yes.

Q. Referring to Mr. Levit's testimony, do you similarly concur in his testimony regarding your conversations with him?

A. There is no difference in my recollection from that expressed by him.

Q. Do you have anything to add about these conversations that he may have omitted?

A. No, I cannot think of anything.

Q. In other words, you think his testimony fully covers his conversations? A. Yes.

Q. In the early part of your examination this morning you referred to an audit and report made by Mr. Bourne as of the time that Mr. Bassick went in as receiver of the company. A. Yes.

Q. I hold in my hand a report and ask you if that is the report that you refer to?

A. That is it.

Q. A copy of it?

A. Yes, that is the original report.

Q. This report was delivered to you in the normal course of business, was it?

A. Yes, it was delivered to the Bank of California as a creditor of The Joshua Hendy Iron Works shortly after its completion. It is dated March 27. It was several months after that before

(Testimony of Charles B. Moores.)

it was delivered. I think it was delivered along in June to me. [603]

Q. It is dated May 22, 1934, covering the period as of March 27, 1934.

A. It was received on May 22, or shortly thereafter.

Q. This report was delivered to you, you say, as a creditor in the course of business, to reflect the assets of the Joshua Hendy Iron Works as they were shown on their books at that time?

A. Yes.

Mr. Ferguson: If your Honor please, I offer this as Petitioner's Exhibit next in order.

Mr. Jordan: I am going to object to the admission of this report, which covers a period—that is a report as of that date—I presume it covers a period prior to March 27, 1934.

Mr. Ferguson: That is a report of what the books show as to the assets and liabilities of the corporation as of that date.

Mr. Jordan: I will object to the introduction of this report on the ground that it can have no possible bearing on this case, it is a matter of two years almost to a day prior to the date of the confirmation of the plan. It is only the period, as I understand, from March 24, 1936 to the date of the sale of the plant that we are interested in. I do not think there is any benefit to be gained by cluttering the record with it. What bearing could it have, the condition of the company in 1934?

(Testimony of Charles B. Moores.)

The Court: It shows the financial and physical condition of the company before the reorganization?

Mr. Ferguson: Yes.

The Court: It may be admitted and marked.

(The document was marked "Respondents' Exhibit B.")

Mr. Ferguson: Q. I show you here what purports to be a pro forma balance sheet dated September 30, 1940, and ask you if you recognize it.

A. That is the usual form of monthly [604] report made by the company's own accountant, as to the estimated condition of the company at the date as of each report, which in this case was September, 1940.

Q. And that was received by you in the normal course of this company's business?

A. Ordinarily these were received about the 15th of the month following the last date.

Q. This is not an auditor's account, but is a pro forma sheet made by the company's auditor?

A. Yes.

Q. Under your practice? A. Yes.

Mr. Ferguson: I offer this, if your Honor please, as Defendant's Exhibit next in order.

Mr. Jordan: To which I object on the ground that it is hearsay, and I take it Mr. Moores did not prepare it.

Mr. Ferguson: No.

(Testimony of Charles B. Moores.)

A. It was prepared by the company's accountant.

Mr. Jordan: Q. For that reason you cannot vouch for those figures, can you, personally?

A. No, I would not vouch for their accuracy, except that they are figures that were accepted by the board as being indicative of the progress made by the company in the interval between the time that auditor's statements were available.

Mr. Ferguson: It is a pro forma sheet and can be proved by the books of the company, I take it. This is a report made in the normal course of business, as testified to.

The Court: You have endeavored to impress the court with the fact that it is unnecessary to have an examination made of these books.

Mr. Jordan: I do feel that way about it.

The Court: If you do, then why object to this report?

Mr. Jordan: Might I ask this, would it be possible to have [605] in court the gentleman who made that.

Mr. Ferguson: No, I have advised you that it would not be. I said you could inspect the books with your accountant.

Mr. Jordan: He did during the noon recess yesterday, and there was some discrepancy, as I understand it, and I told you that I felt we did not want to stipulate that it be put in.

The Court: This same report, you mean?

(Testimony of Charles B. Moores.)

Mr. Jordan: This very one we are talking about now.

The Court: I think I shall admit it unless you wish to insist that you be permitted to make an examination of the books.

Mr. Jordan: I will withdraw the objection, I do not want to do that.

The Court: Very well, it may be admitted.

(The document was marked "Respondents' Exhibit C.")

Mr. Ferguson: Q. Now, Mr. Moores, immediately following the confirmation of the plan of reorganization what was done with the stock? Let me take it in chronological order: Was all of the stock transferred to the Trustees at that time?

A. No, it was not all.

Q. What stock was not surrendered?

A. Dr. Behneman's stock amounting to 1244½ shares, I think.

Q. That is the Dr. Behneman here involved?

A. Yes, H. M. F. Behneman.

Q. With the exception of his stock what was done with the stock certificates?

A. The stock certificates were delivered to the secretary of the company, properly endorsed, voting trust certificates were issued to the depositors for their beneficial interest, signed by each of the directors, and signed, I believe, by the beneficiaries.

Q. As a matter of fact, these trustee's certificates were issued [606] in duplicate and signed

(Testimony of Charles B. Moores.)

both by the beneficiary and by the trustees?

A. Yes.

Q. That is, with the exception of Dr. Behneman?

A. Yes, with the exception of Dr. Behneman.

Q. What was done with the stock in the meantime? Was that transferred to the name of the trustees?

A. The stock was transferred to the names of the then board of directors, who were all voting trustees.

Q. That is all the stock except that of Dr. Behneman?

A. All except the stock which had not been deposited by Dr. Behneman.

Q. As I understand it, Dr. Behneman, according to the testimony here, did surrender his stock in June, 1940, is that correct? A. Yes.

Q. It was approximately in June. At that time trustee's receipts and certificates were issued to him?

A. Were issued to him, though he did not surrender all the stock; there was certain stock he was unable to locate, which has already been testified to.

Mr. Jordan: I will stipulate that there were certificates issued to Dr. Behneman in the amount of 152 $\frac{1}{4}$ shares, and in the amount of 303 $\frac{1}{2}$ shares, those being issued by the voting trustees of The Joshua Hendy Iron Works and signed by the beneficiaries but there is, however, not included in that

(Testimony of Charles B. Moores.)

aggregate the other trustees certificates showing the balance to Dr. Behneman.

Mr. Ferguson: But there was a similar certificate for that?

Mr. Jordan: There was, but we could not find it.

Mr. Ferguson: I will offer these next in order.

[607]

The Witness: This one was merely overlooked.

Mr. Ferguson: To make the record clear, if this is the one that was overlooked we will include it.

Mr. Jordan: I do not care whether you do or not. Do I understand you are making some significance of the certificates, themselves?

Mr. Ferguson: I think from the inquiry you made that the stock certificates may have some significance in this case.

Mr. Jordan: If there is some significance to them I think we should have them all.

Mr. Ferguson: Do you want to me include it in the same exhibit?

Mr. Jordan: That is quite all right.

(The certificates were marked "Respondents' Exhibit D.")

Mr. Ferguson: Q. Now, prior to the time that the stock was delivered out of the hands of the voting trustees, I understand that some stock belonging to Mrs. Hendy was surrendered, is that correct?

A. Yes, by Mrs. Albertie M. Hendy, Mr. Hendy's wife.

(Testimony of Charles B. Moores.)

Q. It has already been pointed out, I believe, in the meeting of the directors of March 18, 1940, a compromise in that regard was approved by the board. What was done with her stock?

A. It was returned to the treasury of the company.

Q. Now, then, next what was done with the stock certificates?

A. There was nothing done with the stock certificates until the time of the distribution of the 2212½ shares to the management, as I recall. The issuance to the stockholders might have antedated that, but I am not quite sure of the sequence of it.

Q. The trust was finally terminated by the board of directors and also approved by the trustees?

A. Yes.

Q. And if I understand correctly, the stock was transferred out [608] of the name of the trustees, and upon surrendering of the voting trust certificates trustees' certificates were returned as to 1907¾ shares to persons who held old stock, and as to 2212½ shares to Bassick, Hyland and Levit?

A. Yes.

Q. Calling your attention to the meeting of the board of directors of November 21, 1939, I hand you the minute book of the company, and having examined the minutes of that meeting, does that refresh your recollection of the transaction involved?

A. That was November, 1939?

Mr. Jordan: I think maybe we can stipulate

(Testimony of Charles B. Moores.)

to that if you let me look through that. This relates to the reduction in 1939 of Class E unsecured notes pursuant to arrangement recited.

Mr. Ferguson: The resolution which I will offer recites that Class E stockholders, excluding the Bank of California, were offered a cash compromise, and in settling that that constituted a reduction to the extent of \$17,000 in the outstanding indebtedness of the company.

The Court: Does that relate to the 305 shares?

Mr. Ferguson: No, it does not. Perhaps we can clear up the 305 shares.

Q. The stock surrendered by Mrs. Hendy was 305 shares, is that correct? A. Approximately.

Q. That was surrendered by her to the company in satisfaction of an outstanding obligation owed by her to the company, is that correct?

A. Yes, it was.

Q. And that was her sole asset and that was the result of compromise negotiations between her representative and the company?

A. Negotiations between Mr. Bassick and her representative. I asked Mr. Bassick to investigate that and find out whether she had any other means of settling it, and Colonel Shores, I [609] think it was, made the suggestion that she give up her stock, which was done. I don't know what the negotiations between them were.

Q. That was ratified by the board of directors, and those were the shares that you testified were

(Testimony of Charles B. Moores.)

turned in to the voting trustees and by them turned over to the corporation to be cancelled?

A. Yes.

Q. That made the differential between 1907³/₄ shares and 2212¹/₂ shares? A. Yes.

The Court: We will be in recess until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [610]

Afternoon Session—2 o'Clock

CHARLES B. MOORES,

Recalled.

Direct Examination (resumed)

Mr. Ferguson: Q. I show you a letter dated December 28, 1936, Mr. Moores, and ask you if that was received by you from Mr. Bassick on or about the date it bears? A. Yes, it was.

Mr. Ferguson: If your Honor please, I am going to offer these, and I suggest that upon their receipt that they all be marked as one exhibit, because they relate to the same transaction. I offer this letter of December 28, 1936.

The Court: What is the substance of it?

Mr. Ferguson: These letters, if your Honor please, conform and run along with the conversations that were being held with respect to the compensation of these officers and distribution of stock.

(Testimony of Charles B. Moores.)

Mr. Jordan: Your Honor, I am going to object to all of these letters upon the ground that they constitute hearsay, and that they are self-serving. If your Honor sees fit to overrule that objection I feel that the letters, in any event, should be limited in effect to the state of mind of the individuals who wrote them, rather than go to the proof of the matters stated in the letters.

The Court: I have not read them.

Mr. Ferguson: These are being offered for the purpose of showing correspondence and negotiations between the directors and Mr. Bassick in regard to compensation and distribution of stock, and for that purpose only.

Mr. Jordan: I have read all of the letters during the noon recess, and I will submit the objections.

[611]

The Court: Overruled.

Mr. Ferguson: This first letter is dated December 28, 1936, on the letterhead of The Joshua Hendy Iron Works, addressed to the

“Bank of California, N. A.,
Sansome & California Sts.,
San Francisco, California.

“Attention Mr. Moores:

“Dear Mr. Moores:

“Replying to your letter of December 24th, it will be convenient to discuss the matters referred to almost any time. I plan to be at the

(Testimony of Charles B. Moores.)

Plant on Tuesday but will be available on Wednesday if this is agreeable to you and the others. If not Wednesday, you set the date and I will make my plans to conform to yours.

“I am very happy in your statement that the progress this company has made has, in the main, been satisfactory and that my continuance with the company has been taken for granted.

“When one works to rehabilitate a business and to build it up for the future, there are many things to be done in the way of redesigning and revising equipment and the securing of new products. In such work it is generally the practice to plow back into the business certain operating profits which otherwise might be carried forward to net profits. My object in trying to rehabilitate the business has been to so conduct it that the business would be placed in as strong a position as is possible and to appear attractive to anyone who in the future might be interested in its purchase.

“What policy to pursue along these lines should be considered and I will appreciate it if you will give it some thought.

“In considering progress made, I would like to have you feel that I recognize the importance of the very substantial and [612] painstaking help that has been given me by you in particular and the bank in general. I have

(Testimony of Charles B. Moores.)

received wonderful cooperation not only from the bank but from the employees of the corporation and for this I am grateful.

“Conditions are such, however, that I cannot afford to devote all of my time to the Joshua Hendy Iron Works on the same terms as now prevail and therefore hope you will give this matter further thought. In considering this matter further, I will appreciate it if you will give due regard to what will happen in the event of the sale of the business or a relinquishment of active control by the principal creditors.

“Please mark ‘personal’ any reply.

“Very truly yours,

W. R. BASSICK.”

(The document was marked “Respondent’s Exhibit E.”)

Q. Now, I think we had come to that point in 1936 when that letter was written, Mr. Moores. Was there any discussion had in connection with that letter, or subsequent thereto? A. There was.

Q. When was that discussion had?

A. I presume the day following that, for which the appointment was made, which would have been close to the following week.

Q. What was that conversation?

A. Well, I can give the tenor of it; it was to the effect that an increase in salary was approved for Mr. Bassick from \$600 to \$700 a month. That

(Testimony of Charles B. Moores.)

matter went on over a number of years and it is hard to identify which year that did happen.

Q. Was anything said at that time with respect to his suggestion to you that he could not afford to keep on working at the existing compensation?

A. Yes, that was brought out, that he was working for a salary that was not commensurate with his duties, that [613] he had other interests which he felt were more profitable, and it was pointed out to him that if through the management this company was successful, he would receive something of tangible value in the way of stock, tantamount in value, but that could be demonstrated only over a period of years by the amount of work that was done.

Q. The next letter that is in chronological order is a letter dated July 12, 1938. Did you have intervening conversations between the date of the last letter of 1936 and this letter of 1938?

A. Oh, yes, I am very sure we did have. I don't think a matter of more than two or three months went by but what the subject was brought up.

Q. There seem to be three letters in this series, the first appears to be a carbon copy of a letter to Mr. Bassick, dated July 12, 1938. Do you recognize that? Are those your initials there?

A. This is a copy of a letter which I had written to Mr. Bassick.

Q. And mailed to him on or about the date it bears date? A. On July 12, 1938.

Q. Then I show you a letter purporting to be a

(Testimony of Charles B. Moores.)

letter to you of Mr. Bassick, dated July 20, 1938. Did you receive that?

A. Yes, this was in reply to mine of July 12th.

Q. On or about the date it bears you received it? A. Yes.

Q. Then what purports to be a reply by you dated July 22, 1938. Was that letter mailed by you? A. Yes, that was a further reply.

Mr. Jordan: Pardon me, Mr. Ferguson. Will it be understood that my objection runs to the entire series of letters?

The Court: I thought you so designated when you made it. I so understood it.

Mr. Ferguson: I offer, if your Honor please, as Respondent's [614] Exhibit E-1, copy of a letter dated July 12, 1938, to W. R. Bassick, 206 Sansome Street, San Francisco.

"Dear Mr. Bassick:

"This letter is written so that you may have confirmation of the understanding of the creditors in making provision under the plan of reorganization of The Joshua Hendy Iron Works for distribution of 50% of the stock of the company to management.

"As stated in our conversation of yesterday, it was contemplated that a five year period would be necessary to demonstrate the success of the plan which can only be measured by the amount of liquidation of indebtedness that

(Testimony of Charles B. Moores.)

has been accomplished at the end of that period.

“Further provision was made for an extension of five years if, in the opinion of the directors, sufficient progress had been made to warrant continuance of the business beyond that time.

“It was recognized that the success of this plan depended upon continuity and ability of management. Accordingly, those men in key positions who are willing to remain with the company until such time as the results of their management have demonstrated the success of the plan will be entitled to participate in the distribution proportionately as, in the opinion of the directors, they have contributed to such success.

“As pointed out to you in conversation yesterday, a transfer of the stock at this time would be an empty gesture as it has no present value in view of the heavy indebtedness and a value can only be established by reduction in that indebtedness.

“Any further discussion with regard to distribution of this stock had best be left until the expiration of the five year period.

“CBM F “Very sincerely yours,”

(The document was marked “Respondents’ Exhibit E-1.”) [615]

(Testimony of Charles B. Moores.)

I offer as Respondents' Exhibit E-2, if your Honor please, the following letter on the letterhead of the Joshua Hendy Iron Works, dated July 20, 1938, to

“Mr. C. B. Moores,
c/o Bank of California, N. A.,
400 California, St.,
San Francisco, California.

“Dear Mr. Moores:

“This will acknowledge receipt of your letter of July 12th with regard to the discussion we had on July 11th concerning the Plan of Re-Organization of the Joshua Hendy Iron Works and the distribution of the 50% of the stock of the Company to Management.

“I have carefully read what you say in the body of your letter, and judge by the closing paragraph the door is closed for further discussion of the stock distribution at this time.

“I would like to make it clear that one of the main things which is disturbing the present active management of the business is: by whom the business is going to be controlled in the future, and what the future policies of the business are going to be. The feeling has been expressed by more than one member of the present management, that it is conceivable control of the Company might again pass into the hands of those who were responsible for its

(Testimony of Charles B. Moores.)

previous condition. I am pointing this out to you because this point is causing considerable doubt and discussion.

It would seem there must be some plan which can be worked out whereby the present active management will feel they can cast their lots in with the Company and be assured that in doing so their remuneration will be in accordance with their responsibility and the results achieved, and their future welfare and peace of mind provided for.

“I feel it would be very advisable that definite assurances be given to the present active management, that in remaining with the Company to the end of the five-year period or longer, —and al- [616] ways provided the good work already done is continued—they will not only have an interest in the business, but that with that interest will go a pleasant relationship.

“Very truly yours,

W. R. BASSICK.”

(The document was marked “Respondents’ Exhibit E-2.”)

Mr. Ferguson: I offer as Respondents’ Exhibit 3, a copy of Mr. Moores’ letter to Mr. Bassick dated July 22, 1938.

(Testimony of Charles B. Moores.)

“Mr. W. R. Bassick
206 Sansome Street, Room 706
San Francisco, California

“Dear Mr. Bassick:

“Your letter of July 20th, referring to mine of July 12th, has been received. You may assure anyone interested that no one will participate in distribution of the 50% of stock of The Joshua Hendy Iron Works except those who are directly employed by the Company and who contribute to success of the business during the five year period or such longer time as is required to demonstrate the success.

“I shall be glad to receive your suggestions as to proper distribution of this stock, that is, the persons whom you consider entitled to participate and the positions occupied by them as well as the number of shares to each.

“There need be no doubt of continuance of the existing pleasant relationship.

“CBM F “Very truly yours,”

(The document was marked “Respondents’ Exhibit E-3.”)

Now, the next communication I find, Mr. Moores, is dated March 18, 1940, and I will ask you whether or not between these letters of 1938, which have been introduced in evidence as Respondents’ Exhibits E-1, 2, and 3, you had any further [617] conversation with Mr. Bassick in this regard?

(Testimony of Charles B. Moores.)

A. At the end of 1939, or during December, 1939, figures showing the result of the four years period I believe were available, and in fact I am sure they were available as of November 30th, and in view of the estimate contained in this result of the first eleven months of operation, the directors decided to grant extra compensation to certain of the employees. I think that is a matter that has been testified to, it is in the minutes of that meeting held in December.

Q. Was there any discussion held with Mr. Bassick regarding possible distribution of stock?

A. Yes, that was discussed at that time, it was brought out in conversation with me by him that the stock now had, or it was indicated that the stock would have, or shortly have, a very tangible value, and that the deficit was now less than the capitalization of \$442,500, in other words, that there was a net worth; that it was not then indicated exactly what that value was, but the statement of December 31, 1939 demonstrated that there was a value of \$30 per share, or approximately that amount, a dollar or two one way or the other, and Mr. Bassick asked if it was not then the time to start distribution. We suggested to him, my original idea, of allowing it to go until further progress had been made, or until the cash was in hand to further reduce the indebtedness. There was no provision in the plan for issuance to the management of the beneficial interest, it merely said stock, and I believe it might

(Testimony of Charles B. Moores.)

have been considered jeopardizing the creditors remaining in control of the company if we could have distributed the beneficial interest rather than stock.

Q. Do you recall any other conversation that you had prior to the date of this letter, March 18, 1940?

A. After additional compen- [618] sation was voted in December Mr. Bassick then again emphasized in the latter part of February, or early in March, that he was still being underpaid, and some of the other employees were, and they would like an expression of the board toward an increase in salary for them. It was a repetition of what had gone on before, it went on again.

Q. And the same discussion regarding distribution of stock?

A. The same discussion with regard to distribution of stock and greater compensation.

Q. I show you what purports to be a copy of a letter by W. R. Bassick "To the Board of Directors, Joshua Hendy Iron Works, San Francisco, California," under date of March 18, 1940. Do you recognize that?

A. Yes, I recall that, and it was set forth very fully at the annual meeting, I believe, which was held on the 24th of March of this year, or very close to that date.

Mr. Ferguson: If your Honor please, I offer this as Respondents' Exhibit E-4, a letter on the letterhead of the Joshua Hendy Iron Works.

(Testimony of Charles B. Moores.)

The Court: It is along the same lines?

Mr. Ferguson: Yes, if your Honor please. He recites some of the reasons, in some more detail, why he believes this was the time to make the distribution.

The Court: Does your objection go to this letter?

Mr. Jordan: Yes. This is the letter I particularly had in mind when I said there were a number of figures set forth, which, again, are self-serving.

The Court: In view of the statement made by Mr. Ferguson before he offered these letters, do you wish to press that point? He said his reasons for offering the evidence were not for the [619] purpose of establishing the correctness of any of the figures that were stated, as I understood it.

Mr. Jordan: That is correct.

Mr. Ferguson: That is correct. These figures were taken from the records, but will be independently proved by the records, themselves.

The Court: It may be admitted and marked.

(The letter was marked "Respondents' Exhibit E-4.")

Mr. Ferguson: This letter is dated San Francisco, March 18, 1940.

"The *the* Board of Directors,
Joshua Hendy Iron Works,
San Francisco, California.

"Gentlemen:

"About four years having elapsed since the date of the re-organization of the Joshua Hendy

(Testimony of Charles B. Moores.)

Iron Works, it seems in order to review the accomplishments in the rehabilitation of the Corporation.

“It is gratifying to know that we have been able, in the main, to carry out the wishes expressed by Mr. C. K. McIntosh, President of the Bank of California, N.A. when W. R. Bas-sick was named Receiver of the Company on March 27, 1934. At that time Mr. McIntosh expressed the hope ‘that the business could be preserved.’ He stated that ‘a going business was an asset to a community and everyone connected with the enterprise and if the business had to be liquidated, there were bound to be some heavy losses for all parties concerned.’

“We feel justified in our feeling that the business has been preserved and that it has grown and given employment to many persons. Many of the old employees have been continuously busy since the first three months from March 27, 1934, in spite of the [620] very special nature of the business.

“With particular reference to the re-organization plan of March 28, 1936, the following payments made on old indebtedness are quite informative:”

Then follows a tabulation which will be meaningless if read, and may be deemed to have been read?

The Court: Yes.

(Testimony of Charles B. Moores.)

Mr. Ferguson: I will only refer to the results given, that is, under the different classes of notes, the amount paid, and the balance due as of March 18, and I will indicate that we have further tabulations to assist the court in that regard.

It shows under Class A notes, which are notes to the United States Government for income taxes plus accrued interest, the entire amount has been paid, \$2450.59, and there is no balance due.

It shows on account of the Class B notes, held by the Bank of California, amounting to \$263,376, \$213,376 has been paid, leaving a balance due of only \$50,000.

It shows that H. L. E. Meyer, Jr., who held Class B notes, had been paid in full \$10,296, and Julia Routzahn, who held B Class notes, had been paid in full \$6605.91.

It shows that Class C notes were \$80,000, and that is outstanding.

It shows that Class D notes were \$7405, \$5164.38 has been paid, leaving a balance of \$2240.62.

It shows of the Class E notes to the Bank of California, \$109,798.47 was unpaid.

To officers, employees and trade creditors, Class E notes, \$88,674.85, there was \$55,483.38 paid, leaving a balance of \$33,191.47. [621]

It also shows the payment of certain interest, but as we are going to put that in a separate schedule I won't bother with it. Then continuing:

(Testimony of Charles B. Moores.)

“All taxes applicable to the Plant and Pear Orchard at Sunnyvale, and to the Bay and Kearny Street Property, San Francisco, have been taken care of. These taxes amount to the total approximate sum of \$20,000.00.

“Taxes on the Orchard property are generally met by the income from the Orchard, but in 1938 the Orchard represented a loss, rather than a profit. Taxes on the Bay and Kearny Street Property are burdensome and every effort should be made to dispose of this property at as reasonable a price as can be obtained for it. It is, of course, difficult to sell choice property of this kind with the waterfront situation as it is.

“Social Security, Old Age Benefit, Sales, Franchise, Income and Excess-Profits Taxes have all been taken care of when due, and it is obvious that these taxes are becoming increasingly burdensome to the business and must be met and will be met out of earnings.

“Referring to the Plant at Sunnyvale, all of the principal buildings have been re-roofed and most of the machine shop has been repainted in the last two or three years. The water tower has also been repainted. A new 16 x 20. Vertical Boring Mill has been installed; also a new Turret Lathe; also a new 7 ft. Radial Drill and Annealing Oven, and certain small equipment, amounting to a total approximate sum of \$70,000.00.

(Testimony of Charles B. Moores.)

“The following amounts of depreciation have been charged off over the periods enumerated:

1934.....	\$27,676.07	
1935.....	36,901.43	
1936.....	25,855.76	
1937.....	26,267.92	
1938.....	27,833.73	[622]
1939.....	30,623.34	
<hr/>		
Total.....	\$175,158.25	

“Without taking into consideration the payment of the 1939 Franchise, Income and Excess-Profits Taxes—which will probably amount, in round figures, to about \$44,000.00—we will have, on March 15th, 1940, Cash on deposit in the Banks and due from the Government on Contract, approximately \$116,000.00 available for Working Capital and Accounts Payable.

“Practically the entire regular product of the Company has been re-designed and modernized, and several new pieces of equipment added. The Plant has been kept busy on many occasions on Placer Gold Dredge work, and a nice volume of this business in the last several years has kept the organization going. It should be noted that this is new business and bids fair to continue.

(Testimony of Charles B. Moores.)

“We have not yet developed as much new standard equipment as we would like to have in order to keep our large variety of tools busy, but we are continually seeking out new products suitable for our manufacturing facilities and are making some progress.

“In the process of rehabilitating the business, nearly the entire management personnel was changed around and their duties defined and responsibilities established. The result has been that key men were put in important positions which they were qualified to fill and a harmonious working organization established. Many records existing only in the minds of the personnel have been put on paper and made permanently available. This represents an asset of considerable value to the Corporation. In this connection it is gratifying we were able to utilize so many of the old employees, thereby getting the advantage of their long [623] years of experience and special knowledge of the business.

“Regarding the Sales outlook. It is of interest to note that during the last several years the Corporation has bid on and been awarded several important contracts covering Hydraulic Gates and Valves for various National and International Projects. Our experience in this class of work has enabled us to bid on and receive awards for this specialized work. In

(Testimony of Charles B. Moores.)

considering the method of selling our regular product, we had to choose between a direct sales force, or through Agents and established Supply Houses. In order to keep our overhead expenses down, considering that our regular line of products was *was* not sufficiently complete, the indirect selling method has been largely followed, except for local business.

“We have established in the last two or three years many foreign connections, some of which have proved to be of great advantage to the Corporation. One foreign connection has purchased thirty Mine Hoists in addition to other equipment, and has just placed an initial order for twenty Ore Cars. Other foreign connections have purchased Ball Mills and other mining equipment. We are using every effort to increase this foreign business *business*, particularly right now, and are meeting with fair success. In addition to the foreign connections, many domestic agencies have been established, most of which have proven their value.

“In conclusion, we wish to say we are particularly grateful to the financial interests which have made it possible to accomplish what has been done, for their support at all times, and for the patience and untiring efforts of the officers and representatives of the Bank; also to the Board of Directors for their interest and support, and to all of the employees who have

(Testimony of Charles B. Moores.)

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(Testimony of Charles B. Moores.)

so [624] loyally given their best efforts to make the Corporation successful.

“Sincerely yours,

W. R. BASSICK,

President.”

Q. The next letter I have is a letter to you dated April 8, 1940. Did you receive that? A. Yes.

Q. Between the time of the report to the board of directors, to which I have just referred, Respondents' Exhibit E-4, and the date of this letter, did you have any further discussions with Mr. Bassick?

A. I do not believe there was in that interval, no.

Mr. Ferguson: I then offer as Respondent's Exhibit E-5 a letter on the letterhead of the Joshua Hendy Iron Works, dated April 8, 1940. It reads:

“Mr. C. B. Moores,
c/o Bank of California, N.A.
400 California St.,
San Francisco, California.

“Dear Mr. Moores:

“In view of the progress made by the Joshua Hendy Iron Works during the last several years, and with particular reference to the showing for the year 1939 and the first two months of 1940, I want to again take up with you the question of my remuneration.

“For your information, I am giving herewith the income received from the Corporation

(Testimony of Charles B. Moores.)

since I took charge as Receiver on March 27, 1934.

Period	Salary	Bonus	Trustee's Fee	Total Earnings
3/27/34 to				
13/31/34	\$5000.			\$5,400.
1935	7200.			7,200.
1936	7200.			7,200.
1937	7200.		5,000.	12,200.
1938	7200.	\$1,800.		9,000.
1939	8100.	2,000.		10,100.
				[625]

“I had hoped that when you received the Financial Statement for the year 1939 and my letter to the Board of Directors as of March 18, 1940, that additional remuneration, in keeping with the circumstances, would voluntarily be given. In view of the fact that I have heard nothing, prompts me to take the matter up with you at this time. You will recall I have previously mentioned, on several occasions, that I do not feel the remuneration I am receiving is in keeping with the results obtained.

“Referring now to the statement of income given above, you will note that in 1937 I received a total amount of \$12,200. which is more than I have received in any one year since, which seems to me decidedly out of line, as since 1937 a much better showing has been made and a much better financial position assured the Corporation. I do not feel it is nec-

(Testimony of Charles B. Moores.)

essary to go into detail here regarding the confused conditions I found when I took the job, and the consequent disagreeable task I had to perform in connection with Court actions, reorganization, changing personnel and so on. You are familiar with the details and the circumstances leading up to bringing order out of confusion. I have given the Company the results of 35 years of manufacturing experience in all branches of the Manufacturing business, and set myself a very severe task in personally taking over the work of directing advertising, sales, production and purchasing, in order to keep down overhead expenses. You will, of course, appreciate that in being the active head of the business, I had to take on the full responsibility for the success or failure of the work, and I had to take final responsibility for the considerable risk involved in Government and other penalty bidding and manufacture.

“In view of the seeming *preemptory* refusal to consider my [626] increase the last time I talked with you on the subject, it is rather embarrassing to have to again bring the matter *up discussion*, but ‘a servant is worthy of his hire’, and if I am not being adequately compensated, I should be, and I feel sure that the representatives of the other creditors will endorse any reasonable arrangements. One should not be expected to work only for the profit of

(Testimony of Charles B. Moores.)

the Corporation, but should share with the Corporation in the results achieved. I have always felt since I have come with the Corporation, that the attitude taken by the principal creditor would be a generous one and that arrangements have been planned whereby I would be taken care of adequately, but now that several weeks have passed since you have had an opportunity to go over the results, and nothing has been said and no notice has been given me of additional compensation, I am forced to the conclusion that the matter has escaped the attention of those most interested, or some plans that I am not familiar with have been made for my benefit.

“In view of the fact that Mr. McIntosh asked me to become Receiver for the Corporation, and in view of the fact that I conferred with him as Receiver and Trustee during the first part of my services for the Company, I am sending a copy of this letter to him for his information and consideration.

“Very truly yours,
W. R. BASSICK.”

(The letter was marked “Respondents’ Exhibit E-5.”)

Mr. Jordan: If your Honor please, at this time, for the purpose of the record, I would like to move to strike all of the letters just read by Mr. Ferguson

(Testimony of Charles B. Moores.)

on the grounds previously stated in my objection, namely, that they constitute hearsay, are self-serving, and upon the further ground that they contain opinions and [627] conclusions which are not evidence.

The Court: The motion is denied. The last letter may be admitted and marked.

Mr. Ferguson: Q. Now, subsequent to April 8, 1940, did you have further conversation with him?

A. I had one conversation with him.

Q. When, in point of time, do you recall?

A. Probably within a week or ten days, or maybe two weeks, at the first opportunity after receipt of the letter.

Q. Where was that held, if you recall?

A. It was held at his office.

Q. What was the conversation?

A. It was a repetition of previous conversations, that he had not been properly compensated, and I still felt that the cash position of the company did not allow of the establishment of fixed compensation in excess of that which he had received; that by the time the particular job that had kept him reasonably busy during the past two years was accomplished and results known, that the board might consider further compensation to him, that I would be glad to consider it, and I thought the other members of the board would, that it was only another year before the first five-year term contemplated by the plan would expire, and that inasmuch

(Testimony of Charles B. Moores.)

as further profits might be made between then and the end of that year, that would look to me to be a very opportune time at which to discuss disposition of the stock, or a portion of it, or whatever, in the opinion of the board at that time, was justified.

Q. Was there any further conversation held following that conversation?

A. Yes, I think there was at least one or two more.

Q. Can you fix those in point of time?

A. There was one in June [628] or July, 1940, and then there was another one when the possibility of sale of the business was under discussion.

Q. Let us refer to the one in June or July; what was that conversation?

A. Well, at that time the big job had been completed, and there had been a profit of in the neighborhood of \$200,000 on that job; the general contractors had paid \$15,000 bonus to the company for having delivered the material in advance of the term called for by the contract, and there was work on the Shasta Dam in prospect, but the drawings had not been submitted yet, so there were no bids; it looked then, there seemed to be a prospect that there would be more of that type of work coming up, and the torpedo tubes and gun mounts which Mr. Hyland mentioned in his testimony were in prospect, but that prospect was too remote, and the profit that might have been derived from that type of work was so small—it was based on a fixed fee

(Testimony of Charles B. Moores.)

of 6 or 7 per cent. of the estimated cost of the job, so it did not seem that the company, in its financial condition, would be warranted in soliciting that type of business; that if it became necessary for them to take it it might have been considered.

Q. I understnad that private work is more attractive than Government work. A. Yes.

Q. Was there any initial discussion had with respect to compensation or partial distribution of stock?

A. Well, it was reported, the results were very satisfactory, that there had been an inclination of the board that had been demonstrated to grant extra compensation; that each year no doubt that would come up again in December when the final results of the year's operations were known, and that when the distribution of stock was again solicited that would be a very opportune time to consider it.

Q. Now, you say you held a conversation at or about the time, [629] as I understand, that the sale of the business was being considered. When was that?

A. That would have been November 4, or 5, or 6. That was in the interim between the granting of the option—just previous to the granting of the option it was discussed in the meeting, at which the option was granted.

Q. Was that a discussion at which all the directors were present?

(Testimony of Charles B. Moores.)

A. All the directors were present at this discussion on November 4.

Q. What was that discussion?

A. Well, Mr. Bassick, in giving his opinion as to the advisability of disposing of the business, brought out that he and the other members of the management had been assured they would share in the business, that the business would be theirs, or they would have a substantial interest in the business when the creditors were satisfied that there was a rehabilitation, that that would mean perhaps at the end of another five years, or whatever time was necessary to demonstrate the success of the plant which might have already occurred, but really they were the ones primarily interested, rather than the creditors, that is, they were to receive this stock and that in their opinion it should be given additional weight on that account. I pointed out to them the corporation was still involved to a substantial amount, that they were holders of an equity which they could look forward to as coming to them, and all of this had to be considered. It was also brought out by me that the plan of the purchaser was not to continue his employment, that it meant that he was out of a job, and that some consideration should be given to that, and that it had been held out to him all of these years as time went on his remuneration would be increased, and there was no possibility of that if he was no longer to be employed. That was all [630] part of the discussion

(Testimony of Charles B. Moores.)

preliminarily to the granting of the option by the board of directors.

Q. That is part of the discussion referred to in the minutes of November 4? A. Yes.

Q. Apparently there was a general discussion regarding the distribution of the shares of stock in accordance with the terms of the plan?

A. Yes, that was also discussed. He brought that point out as to who was to receive the stock, and how much they were to receive.

Q. Were there any other conversations prior to the distribution of this stock?

A. Yes. During the course of the next few days, while this option was still pending, Mr. Bassick, I think, brought up the matter, along the same line—you are speaking of Mr. Bassick?

Q. Yes.

A. He reiterated the argument that he had made before, and indicated that certain assets of the business, it was desirable to withhold from sale.

Q. What was said?

A. He said that he believed that considerable business could be done in the mining equipment business, and also government jobs other than defense jobs, such as they had been in the habit of doing, it would be advisable to hold the patterns, of which the company had a considerable number, or drawings, so that if the group who were to receive this stock in the company desired to continue that they might have those assets with which to continue.

(Testimony of Charles B. Moores.)

Q. What was your conversation?

A. I said that was a matter for them to consider when the creditors were satisfied, that I no longer had anything more—no position other than as representative of the amount of stock which the bank held.

Q. Were those patterns withheld from the sale?

A. They were not [631] included in the sale.

Q. But they were included in the sale. Will you explain that, please?

A. It developed that an inventory which was set forth on September 30 at a figure of about \$120,000 was an inventory of the value of \$40,000 less than that, and rather than adjust that inventory, we allowed the patterns to be substituted for that decrease in inventory. We otherwise would have had to adjust that.

Q. Does that conclude, in general, the conversations had with Mr. Bassick?

A. No, there was further discussion.

Q. When was that held?

A. It was after the exercise of the option. I was away at the time the option was exercised, I returned to San Francisco, about November 20, and at the subsequent meeting of the board the matter of the distribution of stock, and of an amount of cash to adjust the waiver of dividends on that stock that was to be distributed, the best means of properly compensating everybody who had been employed by the company and whose employment had

(Testimony of Charles B. Moores.)

been severed by reason of the sale of the business.

Q. Now, are those the discussions held in the board which were reported in the minutes, but upon which Mr. Bassick did not vote?

A. Yes. His opinion was asked, what he thought his entitlement to be, and what he thought the entitlement of each of the others to be; he was asked as to the salary of the employees, and that was discussed with other members of the board in general, and prior to the meeting, and I think it was discussed at the meeting, that that should come up at the meeting of the directors and we will decide it there.

Q. Was there any other conversation?

A. I do not recall any.

Mr. Ferguson: Now, Mr. Jordan, at twelve o'clock I had re- [632] ferred to some minutes of the special meeting of the board of directors held November 21, 1939, and I understand you consent now that the minutes with respect to the retirement of certain obligations may be introduced.

Mr. Jordan: So stipulated.

Mr. Ferguson: This is a special meeting of the board of directors of Joshua Hendy Iron Works, held on November 21, 1939. All of the directors were present. I am offering all of the minutes in so far as they relate to the redemption of Class E notes. The Class E notes were the unsecured notes under the plan that the creditors held.

(Testimony of Charles B. Moores.)

“On motion made by Director Moorers, seconded by Director Price, and unanimously carried, the following resolution was adopted:

“Whereas, the terms of the plan of reorganization of this corporation, the Joshua Hendy Iron Works, confirmed by the United States District Court on March 24, 1936, provided for the issuance, and this corporation did as of March 24, 1936 issue its unsecured five-year notes to the unsecured creditors of this corporation then holding claims which accrued prior to May 17, 1932, said notes being designated as ‘Class E’ notes; which said notes were issued and are outstanding in the aggregate principal amount of \$198,197.76, of which amount notes in the aggregate principal amount of \$109,798.48 are held by the Bank of California, N.A., and the balance, \$88,399.29, are held by 157 other creditors; and

“Whereas, it appears that this corporation will, on December 15, 1939, have on hand approximately \$60,000 available for the retirement of its outstanding obligations, either secured or unsecured; and [633]

“Whereas, the Bank of California, N. A. has agreed that this corporation may expend all of said sum of \$60,000 in the retirement of the unsecured ‘Class E’ notes of this corporation held by holders other than the Bank of California, N. A. on the basis of 70 per cent. of

(Testimony of Charles B. Moores.)

the principal amounts of said notes; the Bank of California, N. A. being willing, in such case, to stand by and not require that it be included in such offer, as is more fully evidenced by the letter from the Bank of California, N. A. to this corporation dated November 21, 1939, so agreeing, a copy of which letter is attached to the minutes of this meeting and hereby specially referred to; and

“Whereas, it appears to the advantage, benefit, and best interests of this corporation, and of all persons interested therein, that this corporation offer to pay the holders of its ‘Class E’ notes, other than the Bank of California, N. A., an amount of cash equal to 70 per cent. of the principal amount of said notes in full settlement and satisfaction of the same;

“Now, Therefore, Be It Resolved, that this corporation make a written offer to each of the holders of its ‘Class E’ unsecured five-year notes, other than the Bank of California, N. A., offering to pay each of said note holders, in full settlement and satisfaction of the notes held by them, an amount of cash equal to 70 per cent. of the principal amount of such notes so held by them; provided that each such note holder first present the unsecured five-year ‘Class E’ note held by him at the office of the corporation on or before December 15, 1939, at 5:00 p. m.

(Testimony of Charles B. Moores.)

or mail the same so that it will be received by the corporation prior to such time, and at the same time execute a form of satisfaction acknowledging that such payment is received in full satisfaction and discharge of such note so surrendered by [634] each of said stockholders;

“And Be It Further Resolved, that upon the presentation of each of said unsecured five-year ‘Class E’ notes of the corporation on or before December 15, 1939 at 5:00 p. m., or the receipt of the same by mail by this corporation prior to such time, and upon the execution of an appropriate form of satisfaction, as aforesaid, this corporation pay the owner and holder of each of said notes so presented, in full settlement and satisfaction of the same, an amount of cash equal to 70 per cent. of the principal amount of said notes; provided, however, that pursuant to the letter of the Bank of California, N. A., hereinabove referred to, this offer shall not be made to the Bank of California, N. A., on account of the ‘Class E’ notes of this corporation held by it.”

Then, of course, the resolution further continues to empower the President and Secretary to communicate the offer to the holders of the Class E notes and include a form of letter of transmittal and satisfaction to be filled in by the note holders, etc., and those are attached to the minutes, and

(Testimony of Charles B. Moores.)

also the consent of the Bank of California to a settlement on that basis and waiving participation in the distribution of funds in view of the redemption of these interest-bearing notes.

Q. Pursuant to that resolution I understand that these notices were sent out to all the note holders other than the Bank of California, and that a considerable number of them exercised their right to receive that 70 per cent.: Is that correct?

A. Yes, a considerable number did.

Q. So that in that connection \$38,686.87 was paid out on notes aggregating some \$55,000, so that there was a discount and saving to the corporation of \$16,580.19. Is that correct? [635]

A. I believe that amount is correct, according to my recollection.

The Court: I will continue this trial until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until tomorrow, Friday, September 26, 1941, at 10:00 o'clock a. m.) [636]

Friday, September 26, 1941—10 o'Clock A. M.

The Court: You may proceed in *Shores v. Hendy Realization Company*.

CHARLES C. MOORES,

Recalled.

Direct Examination (resumed)

Mr. Ferguson: If your Honor please, there were admitted in evidence yesterday two trustees' certificates, marked Exhibit D, and there was discussion with reference to the fact that there was a certificate missing for 470 shares issued to Dr. Behneman, and we are going to produce it, and I think it may be stipulated as part of the defendants' case.

Mr. Jordan: No objection.

Mr. Ferguson: At the close of the session yesterday we were referring to the minutes of the directors meeting held on November 21, 1939, which Mr. Jordan stipulated to, and we had referred to the fact that as a result of that there was a reduction of the unsecured notes in the sum of \$55,000 by reason of the 70 per cent. offer in compromise.

In addition, there is a second resolution showing the payment of certain secured indebtedness, which reads:

"On motion made by Director Moores and seconded by Director Webber, and unanimously carried, the following resolution was adopted:

"Whereas a letter has been received from The Bank of California, N. A., expressing their willingness to forego payment to them on 'Class B' notes of this corporation in order to enable immediate

(Testimony of Charles B. Moores.)

payment in full of the 'Class B' notes payable to Julia Routzahn and H. L. E. Meyer, Jr."—those "B" notes were [637] secured notes under the plan—

"in the respective amounts of \$5681.09 and \$8854.56, with interest at 4 per cent. from 3/24/39 to the date of settlement, with the understanding that such payment will leave The Bank of California, N. A. the sole holder of notes of this class, and that they shall receive payment of principal and interest in accordance with the terms of the notes.

"Now, Therefore, Be It Resolved that this corporation immediately pay such holders of Class 'B' notes in accordance with the terms of the offer by The Bank of California N. A., receiving from such paid note holders all proper papers showing the retirement of this indebtedness and relinquishment of their rights in the security to these notes.

"And Be It Further Resolved that the President and Secretary of this corporation be and they are hereby authorized for and on behalf of this corporation, and as it corporate act and deed, to immediately pay such holders of Class 'B' notes upon receipt of all proper papers showing the extinguishment of such debt and relinquishment of the collateral security."

(Testimony of Charles B. Moores.)

Q. Those payments so authorized were made, were they, Mr. Moore? A. They were.

Mr. Ferguson: I also desire to read a motion, a resolution from the minutes of the regular meeting of the board of directors held on March 18, 1940, this being done pursuant to a stipulation of Mr. Jordan.

Mr. Jordan: So stipulated.

Mr. Ferguson:

“A motion was made by Mr. Price and seconded by Mr. Webber and unanimously carried ratifying the payment to The Bank of California, N. A. of \$176,503.06, on account of Class ‘B’ notes held by that bank, with interest to the date of payment, and authorizing payment on March 24, 1940 of the accrued interest [638] to that date on the Class ‘B’ notes outstanding.”

Those were the same class of notes as those just referred to.

Q. I will ask you if that amount was paid to the bank. A. Yes.

Q. From what fund was that sum of \$176,000 paid?

A. From the regular cash account of the Joshua Hendy Iron Works.

Q. Did that represent refinancing of that amount? A. No, it did not.

Q. In other words, they paid it from operating revenue? A. From revenue of the company.

(Testimony of Charles B. Moores.)

Q. Now, I understand that you were familiar with the plant of the Joshua Hendy Iron Works?

A. Yes.

Q. And were familiar in 1934 and 1935 with that plant, is that correct? A. Yes.

Q. You were familiar with the Bourne reports which have been introduced through you?

A. Yes, I think so.

Q. Now, in the course of the testimony it has been referred to that at sometime between the time of the appointment of the trustee, and subsequently, that the book value of this plant was written down. Were you familiar with that write-down? A. I was.

Q. Did you have anything to do with the matter as a result of which it was written down?

A. I discussed the matter with Mr. Bassick, and I was present in court at the time that he made his report, and it was decided that it was for the benefit of the company that proper valuation of the assets of the corporation be made.

Q. When you say "proper valuation" of the plant, do you mean that the valuations prior to the write-down were improper?

A. They were obviously improper.

Q. You mean by "they were improper," they were too high or too [639] low?

Mr. Jordan: Are you qualifying Mr. Moores as an expert on values?

Mr. Ferguson: He is in the position of an

(Testimony of Charles B. Moores.)

owner. You understand that any owner may testify as to the value of property.

Mr. Jordan: Yes, that is true.

A. I considered the valuation prior to that write-down was excessively high.

Q. Do you have any idea of what its valuation was, if any, prior to this write-down?

A. I believe it was \$724,000.

Q. Do you know what it was subsequent to the write-down?

A. In the neighborhood of \$350,000.

Q. Did that, in your opinion, represent a write-down to a reasonable value of the plant?

A. I believe that represented the true value after the write-down—at the time of the write-down.

Q. Now, you referred to an appraisal made by Mr. Smiley—that was the appraisal, the transcript of which was read to the Court, having been made before Judge Beasly, is that correct?

A. I believe it was before Judge Wyman.

Q. I think you stand corrected. It was before Judge Beasly, made in October, 1935. Is that correct?

A. Yes, that was it.

Q. Do you know when the plant assets were written down?

A. In December, 1935.

Q. That was before the plan of reorganization was acted upon and confirmed?

A. It was.

Mr. Ferguson: In that connection, if your Honor please, and so that we won't jump backward and forward, I should like to refer to the fact

(Testimony of Charles B. Moores.)

that in evidence there are also other matters relating to this write-down, or in connection with the book value of the assets of the Sunnyvale plant and property. [640] These are in evidence, and I might as well call attention of the court to them at one time. I am referring to page 3 of the plan of reorganization, under the heading

“4. Assets:

“There is no physical inventory of the assets of the debtor corporation as of July 31, 1935.”

That was the date of the plan which was submitted.

“The items under the heading ‘Inventories’ therefore reflect only their book cost; and the items under ‘Capital Assets’ are stated at their book values, which are subject to a substantial write-down because of excess capital charges made, and insufficient depreciation and amortization taken, in prior years.”

I also desire to refer, if your Honor please, to Receivers’ Exhibit No. B, which was the Bourne report rendered to the company of the assets preceding the adoption of the plan. Under the heading of “Capital Assets” we have this:

“Following is a condensed summary of the other Capital Assets from February 28, 1907, to March 27, 1934.”

Then follows a summary, the reading of which I will omit. Then there follows:

(Testimony of Charles B. Moores.)

“The Capital Assets have never been appraised or properly depreciated and their stated value is considered to be considerably in excess of their true value.”

Q. Now, to go back to one further thing, Mr. Moores, when you referred to the sum of \$350,000 as representing, in your opinion, the correct or reasonable value of the plant following the write-down, do you mean as a going concern, or its liquidating value? A. As a going concern.

Q. Would its liquidating value be greater or less? A. It would have been less.

Q. Now, you are familiar, I understand, with the Forbes audit [641] and account, and Bourne audit and account? A. I am.

Q. Which are in evidence? A. Yes.

Q. Have you prepared or had prepared for you a schedule or a statement taken from those reports for the purpose of summarization of the net profit of the company during the period from June 30, 1936 to November 15, 1940, both before and after depreciation, net income during that period, and the net worth year by year?

A. From the Forbes reports?

Q. Yes, from the Forbes reports. I believe in one connection, that is as to the net worth figure of September 30, 1940, it is from the pro forma sheet that is in evidence as Respondents' Exhibit C. A. Yes.

(Testimony of Charles B. Moores.)

Mr. Jordan: Do I understand that Mr. Moores prepared this summary?

Mr. Ferguson: No, that is not correct. It was prepared pursuant to your direction, was it, Mr. Moores? A. Yes.

Mr. Ferguson: These figures, for the Court's information, and for Mr. Jordan's information, can be verified from the reports.

Mr. Jordan: Will the gentleman who prepared this personally be in court as a witness?

Mr. Ferguson: I will say this, that statement was prepared pursuant to Mr. Moores' direction, and it will be verified and checked by Mr. Knott, of Forbes & Company, who has done that. As a matter of fact, I checked it with him this morning, but if you wish he can check it again. All of these figures may be found in the reports, themselves.

Mr. Jordan: As to the statement, I have no objection, but in our case Mr. Gane was here and was subjected to cross-examination, and I think that in all fairness that we should have an opportunity [642] before this is introduced in evidence and becomes a part of the record to cross-examine him.

The Court: Let it be marked for identification.

(The summarization was marked "Respondents' Exhibit F for Identification.")

Mr. Ferguson: Q. Referring to Respondents' Exhibit F For Identification, Mr. Moores——

(Testimony of Charles B. Moores.)

Mr. Jordan: I am going to object, your Honor, at this time to the interrogation of this witness with respect to this exhibit which has only been marked For Identification, and which I understand will be later explained.

The Court: You will have full opportunity to cross-examine the man who made it. Now, it seems to me that we ought not to require this witness to step off the stand and have another witness put on so that you may have the opportunity to examine him now.

Mr. Jordan: Very well, your Honor.

Mr. Ferguson: I might further add, all of these figures are now in evidence.

The Court: Proceed.

Mr. Ferguson: Referring to Respondents' Exhibit F For Identification, Mr. Moores, under the heading, "Net Profit from Operations"—there are two columns, one before depreciation and the other after depreciation. Where were those figures taken from?

A. They were taken from a report of John Forbes & Company, certified public accountants.

Q. The annual reports which are in evidence?

A. The annual reports, and there was one interim report as of November 15, 1940.

Q. I notice that for the period from March 24, 1936 to June 30, 1936, there are no figures. Why is that?

(Testimony of Charles B. Moores.)

A. Because there are [643] no figures available for that definite period. The last available statement prior to June 30 is for the month of March—March 31, 1935.

Q. So they are not included? A. Yes.

Q. Although they do show a profit you have excluded those because no precise figures were available? A. That is right.

Q. I notice the item, "Net income." Do I understand correctly that these net income figures are taken after depreciation and interest deductions, but do not include profits to the company arising from reductions in liabilities, profits on sale of plant or miscellaneous minor surplus charges or credits? A. That is true.

Q. The figures under the column "Net Worth" were taken from where?

A. They were taken after all of this adjustment for reduction in liabilities and certain adjustments in minor amounts.

Q. In other words, this represents a summary as shown by Forbes & Co.'s annual reports, with one exception? A. Yes.

Q. And that is the September 30, 1940 figure which was taken from the pro forma balance sheet?

A. Yes.

Mr. Ferguson: If your Honor please, I offer this in evidence. It was made under this man's direction from the figures in evidence. These figures

(Testimony of Charles B. Moores.)

are presented in this form solely for the Court's convenience. This constitutes nothing but a summary of those figures, so that counsel would not have to go through the reports to arrive at that figure.

Mr. Jordan: May I make this suggestion, I am not an accountant, but I would like Mr. Gane to review these figures, and may I renew my objection at this time until we have an opportunity to do so? If they reconcile with his figures and his version of the reports then we would have no objection.

[644]

The Court: Let him examine them. I suppose you can do that between now and this afternoon.

Mr. Jordan: Oh, yes, I am quite sure he can.

Mr. Ferguson: Then on the same theory I present a summarization taken of the balance due on long term reorganization notes, that is the balance due after reduction from June 30, 1936 to December 31, 1940. This was made pursuant to your direction, Mr. Moores? A. Yes.

The Court: Let it be marked for identification.

(The schedule was marked "Respondents' Exhibit G For Identification.")

The Witness: Yes, this was made pursuant to my instructions.

Mr. Ferguson: Q. Submitted to you, do you mean?

A. It was submitted to me by you in conjunc-

(Testimony of Charles B. Moores.)

tion with Mr. Knott, of John Forbes & Company's office.

Q. The figures were taken from the books of the company, is that correct?

A. They were taken from the Forbes reports.

Q. Mr. Moores, referring to Respondents' Exhibit F For Identification, there is a column showing the net worth as suggested from time to time, and have you had, pursuant to your directions, a chart made reflecting pictorially those figures?

A. I have.

Q. You refer to this chart? A. Yes.

Q. And this is the chart? A. That is it.

Q. Those are the same figures referred to in Exhibit F For Identification? A. Yes.

Mr. Ferguson: Of course, I do not know whether Mr. Gane would prove or disprove this.

The Court: I understand that. I think it would be proper that Mr. Jordan's expert be allowed to examine the figures. [645] and tell him what he thought about it before he withdrew his objection.

Mr. Ferguson: That being the case, I will offer this pictorial representation also for identification.

The Court: It may be marked For Identification.

(The chart was marked "Respondents' Exhibit H For Identification.")

Mr. Ferguson: Q. Mr. Moores——

The Court: What is this?

Mr. Ferguson: A pictorial representation, it is

(Testimony of Charles B. Moores.)

a graph, a pictorial representation of the net worth of the company on the date of each annual report, and the figures of which are contained in Respondents' Exhibit F for Identification.

The Court: Who made it?

Mr. Ferguson: It was made pursuant to Mr. Moores' direction. I made it, myself, as a matter of fact.

The Court: It is a nice piece of work.

Mr. Jordan: I think so, myself. He is a good draftsman.

Mr. Ferguson: Q. With respect to Respondents' Exhibit G for Identification, showing the balance due as it existed from time to time, you have also had a pictorial representation or graph made of that? A. Of the indebtedness, yes.

Q. Showing the balance of principal due from time to time, and the balance of principal plus accrued interest from time to time?

A. Yes, both are shown.

Q. And this is that graph? A. Yes.

Mr. Ferguson: I will ask that this be marked as Respondents' Exhibit I for Identification, if your Honor please.

The Court: It may be marked.

(The chart was marked "Respondents' Exhibit I for Iden- [646] tification.")

Mr. Ferguson: Q. Now, Mr. Moores, turning to the sale of the property, the minutes were referred to and read in evidence, that is, portions of

(Testimony of Charles B. Moores.)

the minutes of the directors meeting of November 4, 1940, that related to the approval of the option by the Board of Directors and the issuance of the option. Was the option approved and the sale approved by the stockholders of this company?

A. It was approved by the stockholders of record, yes.

Q. That was done at the stockholders meeting held November 15, 1940? A. It was.

Mr. Ferguson: If your Honor please, I desire to present a matter to the Court that has not been brought to the attention of the Court. Mr. Jordan has referred to the fact that at this stockholders meeting that "The following voting trustees, being a majority of the voting trustees entitled to vote all of the outstanding stock of The Joshua Hendy Iron Works, a corporation, were present: A. J. Mayman, W. R. Bassick, and Ernest H. Price. The following voting trustees were absent: A. E. Webber and C. S. Moores. Mr. W. R. Bassick was appointed and acted as chairman of the meeting." Mr. Jordan has referred to that portion of it which recited that at a meeting of the board of directors held on November 4, 1940, the following resolution had been adopted, setting forth the resolution in full, and setting forth that an option had been granted to MacDonald and Kahn. I desire to continue reading from that point, after setting forth the directors' resolution in full:

"And that pursuant thereto the Joshua

(Testimony of Charles B. Moores.)

Hendy Iron Works had executed said option and received the consideration therefor.”

That would be \$10,000. [647]

“The Chairman further stated that since the voting trustees were the persons entitled to exercise more than a majority, to wit, all of the voting power of the outstanding capital stock of The Joshua Hendy Iron Works, it was in order for them to either approve or disapprove said option and the sale of substantially all of the property and assets of the corporation therein, and by said directors’ resolution adopted and approved.

“The chairman further reported that on November 13, 1940, Mr. A. J. Mayman, as Secretary, and on behalf of the voting trustees, had addressed the following communication to all of the holders of voting trustees certificates, fully advising them with respect to such action of the board of directors and to the proposed approval thereof by the voting trustees.”

Then follows a communication which had been addressed by the Secretary to all of the holders of beneficial interests, that is, all of the old stockholders of the company.

“November 13, 1940. To the Holders of Trustees’ Certificates issued by the Voting Trustees under the Plan of Reorganization of

(Testimony of Charles B. Moores.)

Joshua Hendy Iron Works confirmed by the U. S. District Court, Northern District of California, Southern Division, on March 24, 1936.

“On November 4, 1940, the Joshua Hendy Iron Works granted an option to MacDonald & Kahn, Inc. for the sale of its Sunnyvale plant and equipment, excluding cash and accounts and notes receivable, for the sum of approximately \$426,000—the exact amount of the consideration being dependent upon the inventory on hand at the date of sale. It is now apparent that MacDonald & Kahn, Inc. will exercise their option on November 15, 1940, and will, subject to the usual conditions incident to such sale, deposit the purchase price on that date. The directors [648] of the company have estimated that the proceeds of such sale, together with the cash and accounts and notes receivable of the company, will be sufficient to not only pay off all of the outstanding obligations of the company, but also enable the company to pay liquidating dividends to its shareholders aggregating approximately \$50 per share.

“Under the terms of the confirmed plan of reorganization and the voting trust therein provided for, the voting trustees, are, of course, empowered to vote all of the stock of the company. Since it is obvious to us that the proposed sale will be to the advantage of the company,

(Testimony of Charles B. Moores.)

and after payment of all its debts, will result in a very substantial realization by its stockholders, we, as voting trustees, propose to vote the stock in ratification of such sale already approved by the directors of the company. In order that you may be fully advised in the matter, however, we are taking this means of acquainting you with the situation; and should you have any question with regard to the matter we shall be pleased to discuss the same with you.

Very truly yours,

THE VOTING TRUSTEES
UNDER THE AFORESAID
PLAN OF REORGANIZA-
TION

By A. J. MAYMAN,
Secretary."

Then at the same meeting, if your Honor please, following there is a resolution adopted by the stockholders approving the plan of sale and execution of the option of sale.

Q. Mr. Moores, following the mailing of the notice by the voting trustees that they were going to vote the stock in confirmation of the option and the sale were any objections received from any of the old stockholders then holding beneficial interest certificates?

A. I heard no objection from anybody. [649]

(Testimony of Charles B. Moores.)

Q. Do you know of any objections that were made?

A. No, they expressed themselves as approving, with the exception of Mrs. Shores, that was sometime later—Mr. Gardner and Mr. Al Behneman, and Mrs. Shattuck—

Mr. Jordan: Your Honor, I think this is all hearsay as to what some of these stockholders may have told Mr. Moores.

Mr. Ferguson: If your Honor please, there has been a contention or an intimation that this sale was not properly made, and we desire to show that before the voting trustees approved the sale they communicated with all outstanding holders of trustees' certificates, and no objections were received. We think that that is very important, if your Honor please.

The Court: It seems to me in a case of this kind that there will be hearsay. We have had a lot of hearsay in this case—

Mr. Jordan: I will withdraw the objection.

Mr. Ferguson: Now, I understand from you that the option was exercised on November 15, 1940, is that correct? A. That is correct.

Q. From the standpoint of the business, the operation of the business, the operation of the plant by the Hendy Realization Company ceased as of noon of that day, November 15, 1940?

A. Yes, it did.

Q. And any subsequent transactions or opera-

(Testimony of Charles B. Moores.)

tions of the plant were by the purchaser and not by the company here before the Court?

A. That is true.

Q. And subsequent management of this corporation was by a board of directors and the officers who had formerly operated the plant had nothing further to do with respect to the action taken by the board of directors, is that correct? A. Yes.

Q. The subsequent management of the Hendy Realization Company [650] following noon of November 15, 1940 was by whom?

A. It was by the same board of directors and the same officers up until March 17, 1941, at which time a new set of directors and new set of officers were elected. Some were the same officers and some were different. I am the only member on the board that was on the board prior to March 17, 1941.

Mr. Ferguson: If your Honor please, in connection with the distribution of stock Mr. Jordan referred to and read to the Court some of the minutes of the directors meetings held December 4, 1940, with respect to that distribution, and I called your Honor's attention at that time to the fact that that was an adjourned meeting that was held and that there had been a discussion prior to that from which it had been adjourned. Mr. Jordan did not present that other matter, and I desire to present that other matter to the Court to complete the picture of the deliberations had by the board of directors.

(Testimony of Charles B. Moores.)

Mr. Jordan: As far as any conversation is referred to, Mr. Ferguson, I have no objection, but I would object, of course, to any self-serving declarations.

Mr. Ferguson: This is merely the minutes. This is a record of the minutes of the board of directors, what was actually done in connection with the distribution of the stock.

The Court: If there is any objection, Mr. Jordan you may make them later on in connection with the motion to strike.

Mr. Jordan: What I have in mind is, for example, I notice they refer to the company having been rehabilitated; that is a self-serving declaration; that is the thing your Honor is to decide and I do not want to be bound by it, and I would object to the reading of any material of that kind in a meeting of this sort.

The Court: I think if there is a statement in these minutes [651] such as suggested by Mr. Jordan, it is open to objection.

Mr. Ferguson: I will say in this regard that under the plan of reorganization the question of rehabilitation is necessarily in the discretion of the board of directors, and if they determined in their opinion it was rehabilitated, it is a good indication to the Court that is what was done.

The Court: As long as it is understood that any such statement contained in the minutes is not bind-

(Testimony of Charles B. Moores.)

ing upon the Court, that will satisfy Mr. Jordan's objection.

Mr. Jordan: I think it will entirely, your Honor. That is the very thing I have in mind.

Mr. Ferguson: This is the meeting of December 2, 1940.

"Director C. B. Moores then called the following facts to the attention of the board of directors:

"(1) That certain of the officers and employees of the corporation have, since its reorganization, rendered extremely valuable services to the corporation, resulting in its rehabilitation as a sound and going business, and the improvement of the financial condition of the company from a point where the stockholders of the company had little or no equity, as evidenced by the records of the reorganization of the corporation under Section 77B of the Bankruptcy Act, to a point where the equity of the stockholders has become very substantial;

"(2) That it was this rehabilitation of the corporation's business, so occasioned, which made possible the advantageous sale of the Sunnyvale plant and properties of the corporation, just consummated.

"(3) That notwithstanding the value of such services to the corporation, the compensation of such officers and employees has not been

(Testimony of Charles B. Moores.)

commensurate therewith; and that the board, through its [652] directors, has repeatedly represented to such officers and employees that the compensation received by them during said period would be supplemented by additional payment therefor as soon as, in the opinion of the board, such further payment was practicable and expedient;

“(4) That, in addition, due to the sale of the corporation’s Sunnyvale plant and properties, the employment of said officers and employees has necessarily been abruptly severed and their vacation and other rights interfered with;

“And he suggested that, since the affairs and position of the corporation now warranted the board’s action in such connection, the board consider the proper payment and reward of such officers and employees on account of their said services and in relation to their respective contributions to the restoration of the corporation. This being the consensus of the meeting, an extended and detailed discussion upon the matter was thereupon had, all directors participating, in an effort to work out a definitive plan for such payment commensurate with the best interests of the corporation and the fair and proportionate payment and reward of such officers and employees. Various tentative proposals in this regard were made and considered,

(Testimony of Charles B. Moores.)

and thereupon, and upon motion duly made, seconded, and unanimously carried, the meeting was duly adjourned to Wednesday, December 4, 1940, at 11:00 o'clock a. m., in order that the directors should have an opportunity to further consider and weigh said proposals prior to, and so as to enable, matured and final action thereupon.

“There being no further business, the meeting adjourned to Wednesday, December 4, 1940, at 11:00 o'clock a. m., in accordance with the foregoing motion.”

Mr. Jordan: When did you say that meeting was—December [653] 2?

Mr. Ferguson: Yes, two days before the meeting of December 4 was held, at which time, from the minutes Mr. Jordan has already read into the record, the cash distribution, aggregating some \$102,000 to a considerable number of the employees of the corporation was authorized. That resolution was read into the record.

Q. Now, you heard Mr. Jordan read the subsequent resolution into the record regarding the payment of those amounts? A. I did.

Q. Will you tell us whether there were any other considerations other than those recited in the resolution which prompted the board in its deliberations with respect to the making of these cash distributions?

(Testimony of Charles B. Moores.)

A. You mean reasons in the mind of the board?

Q. The reasons they had for making this cash distribution.

A. The reason was that the corporation had ceased business and was contemplating dissolution; that if each of those employees who might be entitled to receive stock, in the opinion of the board, were to have stock distributed to him it would require a rather involved complication, and when we got through, after they received the stock they would have to participate in the liquidating dividends, and the proceeding was determined to adjust the compensation to approximately the amount which they would have received as liquidating dividends on the stock. There were three principal employees who received part of their compensation in cash and part in stock. The cash compensation paid to them was adjusted to the amount of stock that would be distributed among them.

Q. That is, do I correctly understand that one of the considerations was the number of shares of stock that they would receive by [654] way of distribution?

A. Yes, one might have received three and somebody else five, somebody else fifteen, and somebody else a hundred.

Q. Now, turning to the second consideration which you mentioned, that was the fact that if the stock were distributed first, and then the distribution would be made, and I think you referred to

(Testimony of Charles B. Moores.)

it yesterday, that you felt that the distribution each person would receive in stock or cash distribution, as liquidating dividend, they were substantially the same?

A. Substantially the same amount, except there would be more by reason of the fact that there *would be more by reason of the fact that there* was a tax payment involved that amounted to a considerable amount per share on the stock outstanding for the holders of the beneficial or voting trust certificates and those who would receive stock under the plan of distribution.

Q. That is, if this might have been paid by stock it would have constituted a tax off-set as against the distribution of cash by way of liquidating dividends, is that correct?

A. Yes, it amounted to something in the neighborhood of \$30,000.

Q. Returning now to the distribution of stock, I believe the resolution referred to the fact that the stock was distributed to Mr. Bassick, Mr. Hyland, and Mr. Levit, only upon their first executing a waiver of right to participate in the first liquidating dividends? A. That is true.

Mr. Ferguson: If your Honor please, these waivers appear in the minute book following the meeting at which the distribution of stock was made. They are identical in wording, save in so far as they refer to the number of shares distributed to each man, and I would like to read one, and it

(Testimony of Charles B. Moores.)

may be deemed the others are the same except in name and amount. [655]

“For and in consideration of the distribution, transfer, and assignment to the undersigned of 8121½ shares of the capital stock of Hendy Realization Co., a California corporation (formerly The Joshua Hendy Iron Works), receipt whereof by the undersigned is hereby acknowledged, the undersigned does for himself, his heirs, successors and assigns, expressly waive any and all right to receive any dividends or distribution upon said stock out of the first \$85,848.75 available for dividends or distribution upon the capital stock of Hendy Realization Co., in dissolution or otherwise, so that said sum of \$85,848.75 may be pro rated and paid by way of dividends, distribution or otherwise (or set aside for such payment) only to the holders of the remaining 1907¾ shares of the outstanding stock of Hendy Realization Co., on this date held by voting trustees under and pursuant to the terms of the confirmed plan of reorganization of said corporation and the voting trust certificates issued pursuant thereto. The undersigned does not waive his right to participate in dividends or distributions upon the capital stock of this corporation made in excess of said sum of \$85,848.75, as aforesaid.

“This waiver shall be delivered to Hendy

(Testimony of Charles B. Moores.)

Realization Co. and filed with said corporation.

“Dated at San Francisco, California, December 20, 1940.”

That was signed by W. R. Bassick. There were 700 shares distributed to Mr. Levit, and 700 to Mr. Hyland.

Q. So that the distribution of the first liquidating dividend of \$45 per share which was made to the old stockholders of the company was not participated in by the three directors who had been distributed this stock pursuant to the plan, is that correct?

A. That stock did not benefit by that distribution. [656]

Q. And the reason it did not benefit was because of this waiver procured in connection with the cash distribution of this amount of \$85,000 in the aggregate?

A. That is true.

Q. I notice it has been referred to, in the course of the proceedings, that during some prior years amounts of money had been paid in various years to Mr. Bassick, Mr. Hyland, or Mr. Levit, or some of them, over and above the amount of salary. Will you explain what those were?

A. They were interim bonuses pending the time when the company would be in a cash position so that it could afford to pay salaries commensurate with their duties, abilities and responsibilities. They were trifling in amount.

(Testimony of Charles B. Moores.)

The Court: What do you mean by "trifling"?

A. I think the greatest amount paid to anyone at any one time was \$2000 additional compensation for a year's time. It did not result in a compensation which was anywhere near adequate.

Mr. Ferguson: Q. I understood the testimony the other day on Mr. Jordan's examination to be that your estimate of the amount possibly available for further liquidating damages to be approximately \$45,000 upon all of the remaining assets: is that correct?

A. \$45,000 less whatever expenses there may be for taxes and maintenance of remaining assets of the company.

Q. We will make a nominal reduction for that. Would it be fair to say that you would anticipate on the outstanding stock approximately \$10 per share more might be paid?

Mr. Jordan: This is your witness, and you have been leading, and I have not made any objection. Why don't you ask a question?

Mr. Ferguson: I thought it was apparent.

Q. Mr. Moores, what would you anticipate the outstanding stockholders might receive?

A. If the remaining property could be sold for \$45,000 there should be \$45,000 available for further [657] distribution. If it is sold for less than that, any distribution will be somewhat less; it will amount to approximately \$10 a share.

Q. Subsequent to November 15, 1940, the cash

(Testimony of Charles B. Moores.)

distribution to stockholders Bassick, Hyland and Levit was \$80,000? A. \$80,000.

Q. And as testified, the other stockholders \$85,-848.75?

A. Yes. Some of the total of \$85,000 is not delivered. One particular stockholder has not been able to discover her stock, and her dividend is awaiting her.

Q. The check has been issued and it is merely awaiting delivery? A. Yes.

Q. So that on the outstanding remaining estimated amount of \$10 a share to be delivered upon the new outstanding stock, there would be delivered to stockholders Bassick, Hyland and Levit the further sum of \$22,125, and to the other stockholders \$19,077.50, is that correct? A. Yes.

Q. Now, have you, for the purpose of illustration, had a schedule prepared which shows these amounts to which you have testified and the total amount that each would receive?

A. Yes, this is a schedule, or copy of it.

Q. That shows that the cash distribution subsequent to November 15, 1940, plus the estimated amount of future liquidating dividends to stockholders Bassick, Levit and Hyland, would be \$102,-125? A. That is correct.

Q. And to the other stockholders would be \$104,-926.25? A. That is correct.

Q. Or a relation of 49.32 per cent. to stockholders Bassick, Hyland and Levit, and 50.68 per cent. to the other stockholders?

(Testimony of Charles B. Moores.)

A. That is right. [658]

Q. I notice a note upon this tabulation as follows: "The foregoing amounts are distributions made and estimated distribution to be made by the company subsequent to the sale of its Sunnyvale plant November 15, 1940. Prior compensation paid to Bassick, Hyland and Levit on account of their services for the period March 24, 1936 to November 15, 1940, are not included, because they were payments on account of services currently rendered and as such were charged as current operating expenses of the business."

A. That statement is true.

Mr. Ferguson: I offer this in evidence as Respondents' Exhibit next in order, if your Honor please.

Mr. Jordan: No objection.

The Court: It may be admitted and marked.

(The Schedule was marked "Respondents' Exhibit J.")

Mr. Ferguson: Q. Was the sale of the Sunnyvale plant on November 15, 1940, a sale of the plant as a going concern, or as in liquidation?

A. It did not include good will, it was not a sale as a going concern, it was a sale of the facilities that were there.

Q. The operating facilities that were in operation?

A. That were in operation, yes.

Mr. Ferguson: If the Court please, subject to

(Testimony of Charles B. Moores.)

making my offer in evidence of the four exhibits marked for identification I am through with Mr. Moores at this time. Do you wish to cross-examine Mr. Moores now?

Mr. Jordan: Yes.

Cross-Examination

Mr. Jordan: Q. Mr. Moores, did I understand you to say just a moment ago that the plant was not sold as a going concern?

A. The plant was sold as a going concern. I may have given a [659] wrong impression in my answer. What I meant to say was that the business was not sold as a going concern. They did not buy the accounts receivable, they did not buy the good will of the business, they did not take over the accounts of the concern.

Q. What was the value of the good will carried on the books?

A. There was no value. Mr. Kahn said he would not give a nickel for it.

Q. But the sale did not include the continuance of the use of the name Joshua Hendy Iron Works?

A. The use of the name, it did not.

Q. And necessitated a change to the Hendy Realization Company, didn't it? A. Yes.

Q. And the purchaser, very shortly after the date of the sale, formed a Nevada corporation and adopted that name, and is using it to-day, isn't that true? A. Yes.

(Testimony of Charles B. Moores.)

Q. The plant never did shut down, to your knowledge?

A. There might have been a matter of a few days for inventory, that was all.

Q. And there was a certain amount of work in progress that was continued and completed by the purchaser?

A. That is true.

Q. Under the terms of the sale adjustments were to be made for concluding these jobs?

A. Yes.

Q. A great many of the old plant's employees that were under the old regime were retained on as employees of the company, isn't that correct?

A. Practically all of them are, as far as I know.

Q. That would include, as far as you know, substantially all of those seventeen employees that participated in the bonus distribution in December, 1940, to the extent of approximately \$23,000?

A. I have no knowledge except as to one or two or those. [660] I don't know whether the others are still there.

Q. Now, you testified as to your opinion regarding the value of the plant prior to the confirmation of the plan. You feel qualified to give an opinion as to the value of the plant as a going concern at that time, do you?

A. Yes, I do.

Q. How many acres of land are involved down there, do you know?

A. There are about 29 acres of land, altogether.

Q. How many buildings are there on that land?

(Testimony of Charles B. Moores.)

A. I have not any idea how many are there now. There were about five buildings there.

Q. Now, during your direct examination, Mr. Moores, Mr. Ferguson read into the record a letter addressed to the holders of trustees' certificates issued by the voting trustees under the plan of reorganization of The Joshua Hendy Iron Works dated November 13, 1940; that, incidentally, forms part of Plaintiff's Exhibit No. 6. Now, in that letter the holders of the trustees' certificates, in other words the old stockholders were notified of the impending sale of the plant, is that correct?

A. That is true.

Q. That is dated November 13, 1940?

A. Yes.

Q. As a matter of fact, on November 4, 1940, the board of directors of the company had given to MacDonald & Kahn a firm option for the purchase of that property, and had received a consideration of \$10,000, had it not? A. Yes.

Q. Thereafter the necessary steps to sell the property if the purchaser and holder of the option wanted to buy had been taken some nine days before this letter, that is right?

A. That is true, I presume that letter had gone out on that day. I was not in San Francisco at the time. I left on election day, I believe it was November 7, last year, and was gone for a matter [661] of ten days.

Q. You were present at the directors meeting on November 4?

(Testimony of Charles B. Moores.)

A. Yes, I was present at that time.

Q. When the resolution was adopted authorizing the execution of the option for a consideration?

A. Yes.

Q. Now, there was a stockholders meeting held on November 16, 1940? A. Yes.

Q. By the way, do you know whether this letter dated November 13, advising the old stockholders of the impending sale of the plant was mailed on the 13th?

A. I do not know. My supposition is that it was.

Q. In any event, you did know that on November 15, at 11:00 a. m., there was a stockholders meeting, at which time the granting of the option and the sale of the property was ratified?

A. I was not present at that meeting.

Q. Do you know of your own knowledge that that meeting took place?

A. I believe that the minutes of the meeting were adopted at a subsequent meeting of stockholders.

Q. You have not any knowledge of the date?

A. No, I have not.

Q. Well, the records introduced by Mr. Ferguson speak for themselves. All of the stock outstanding at that time of the company as far as voting power was concerned was vested in yourself, Mr. Mayman, Mr. Price, Mr. Webber, and Mr. Bassick?

A. Yes, that is true.

Q. So that although you were not present at this meeting of November 15 at 11:00 o'clock in

(Testimony of Charles B. Moores.)

the morning, a day and a half after you sent out this notification to the old stockholders regarding the sale—Mr. Webber was not present, as indicated by the minutes—Mr. Bassick, Mr. Price, and Mr. Mayman, according to the record, were there, and they were all voting trustees and [662] also directors, weren't they, at that time?

A. That is true, they were a majority of the voting trustees.

Q. So that on November 4, as directors, they proceeded to vote for the granting of the option, and on November 15, a day and a half after notification went out to the old stockholders, they ratified their act as directors by voting as voting trustees, is that correct?

A. That is correct, yes.

Q. And you were not there at the meeting, so you don't know whether anyone else was present. The option was actually exercised on November 15, 1940, was it not?

A. I presume it was.

Q. Of course, it had to be exercised before noon of that day or it would have expired.

A. The records indicate that it was exercised.

Q. Now, Mr. Moores, I am not going to read all of the minutes of the meeting of December 2 again, but a portion of the minutes of this meeting. The board of directors had a special meeting held on December 2, 1940, at 11:00 a. m., and certain remarks are attributed to you.

A. That is true.

Q. Apparently you made a little talk at that time and you said that certain of the officers and

(Testimony of Charles B. Moores.)

employees of the corporation have since its reorganization rendered extremely valuable services to to corporation, etc., and you said that it was this rehabilitation of the corporation's business, so occasioned, which made possible the advantageous sale of the Sunnyvale plant and properties of the corporation, just consummated. What did you mean by that?

A. That the business had been conducted as a going concern, had operated at a profit, had decreased the indebtedness substantially during the period of its operation, that the plant had a value that it would not have had if liquidated, that the stockholders out of the proceeds of this sale would receive [663] more money than had been taken out since 1906, and I don't know how many years prior, it had been a headache for most of the people that were involved in it.

Q. Including the Bank of California, which had been a creditor continuously since 1907?

A. That is true.

Q. Isn't it a fact that conditions generally were such that this property was more attractive and more subject to sale in November, or the fall of 1940, than it had been at any time prior from the date of the confirmation of the plan, on?

A. Apparently so, because that is the first substantial offer for the property that ever had been received. Had the property been sold at the same price ten years or five years previous, the proceeds

(Testimony of Charles B. Moores.)

of the sale would not have been sufficient to pay off the debts, much less pay the stockholders.

Q. There is not any question about it but what that plant at that time was and is now adapted to the handling of defense work?

A. I do not know that it is adapted to the handling of defense work. It was necessary for the new management to make an addition to the old plant and to build a new plant, spend about a million and a half dollars on the plant to make it adaptable for defense work.

Q. At least the potentialities were there, you will go that far, won't you, they did not have to build a new plant?

A. Yes, they did have to build a new plant. The main value of the plant to the purchasers, as was expressed to me by one of them, was there was a lot of second hand machinery in place which they could use.

Q. And are using to-day?

A. I presume they are, but not on the particular defense work which was in contemplation at the time, which was torpedo tubes and gun mounts. They had to spend one [664] million dollars for a new plant.

Q. You know of your own knowledge they are using that portion of the plant that was sold, that is, you understand there have been considerable improvements and additional plant, machinery, etc., but the plant that was sold in November of last

(Testimony of Charles B. Moores.)

year is being used presently on defense work, to your own knowledge?

A. A part of it is being used, different machines in the plant are being used for that, but from what I have been told, I don't know this of my own knowledge, if you want hearsay, they are working on a job for the Todd California Shipyards, on some marine engines for the British Government.

Q. And the foundry is certainly being used at the present time?

A. I have not been down there for several months, but when I was down there it was then contemplated it would be used as an iron foundry, not a steel foundry.

Q. Of course, the management had nothing to do with the creation of the defense program?

A. I hope not.

Q. Now, you also said, Mr. Moores, "That notwithstanding the value of such services to the corporation,"—you said—"that, in addition, due to the sale of the corporation's Sunnyvale plant and properties the employment of said officers and employees has necessarily been abruptly severed and their vacation and other rights interfered with." Was that a consideration in the mind of the board, generally, at the time that the stock was distributed and the cash was distributed?

A. This was particularly true as to Mr. Bassick, whose health was such that he could not hope to be employed after the cessation of this work.

(Testimony of Charles B. Moores.)

Q. I presume to perhaps a lesser degree it would affect Mr. Hyland and Mr. Levit?

A. Mr. Hyland has severed his connection with the successor company, as I understand, and Mr. Levit is [665] a man getting along in years; he put in 40-odd years with the company, and certainly is entitled to some consideration.

Q. The board did consider this as a fact?

A. It did.

Q. In the distribution of the stock, as well as the cash?

A. Yes.

Q. Now, you also said that in December the board wanted to give the management the stock but it would make a lot of calculation in so far as the distribution of the first liquidating dividend was concerned. Did you work out a system whereby you distributed cash that you considered the equivalent of the first liquidating dividend that would be payable on the stock which they were to receive and equalize it with the amount payable to the old stockholders. Is that your testimony?

A. That is true, but the major portion of that \$102,600 was paid to the management—with the exception of \$22,600. There were people included in the payment of \$102,600 who could not be considered part of the management entitled to this stock.

Q. As a matter of fact, the cash was voted, almost \$103,000?

A. \$102,600.

Q. Was voted to be paid on what date?

A. As soon thereafter as practical, I imagine, I don't know.

(Testimony of Charles B. Moores.)

Q. Do you remember?

A. It was to be paid sometime before the end of the year.

Q. It was December 4, was it not, when you voted the bonus?

A. I believe it was, yes, as soon as the cash condition of the company permitted.

Q. That is correct.

Mr. Ferguson: It was authorized that day, and I think it may be stipulated it went out in the next few days.

Mr. Jordan: It was paid.

Mr. Ferguson: Yes. [666]

Mr. Jordan: Q. The stock was not distributed, the 2212½ shares to Mr. Bassick, Mr. Hyland and Mr. Levit, until the 20th of December, 1940?

A. I think that was the date.

Q. In other words, the money was paid considerably before the stock was actually distributed?

A. Yes.

Q. Now, was it originally contemplated that other employees or officers of the company than Bassick, Hyland and Levit would receive a portion of this stock?

A. Yes, it had been. There were a number of the employees who had been considered.

Q. So that as it finally developed after the seventeen employees other than Bassick, Hyland and Levit received approximately \$23,000 in additional compensation in December, 1940, and Bassick, Hy-

(Testimony of Charles B. Moores.)

land and Levit received \$80,000 amongst them, they also got all of the stock?

A. Bassick, Hyland and Levit got 2212½ shares.

Q. And the other stockholders or the other employees received no part of it, is that correct?

A. That is correct.

Q. You said, and it is already in evidence, that bonuses were paid in varying amounts each year to Mr. Hyland, Mr. Levit and Mr. Bassick, in 1937 to 1941.

A. In different years. I think there might have been a year they were not, I do not recall exactly.

Q. There was not a year when there was not either a declaration of bonus or an increase in salary, was there?

A. To those three individuals?

Q. To those three.

A. I think their salaries, including all bonuses, were progressively more as time went on. There might have been one year when they received less than the previous year, but I do not recall that as a fact. The intention was to increase their compensation, if that is what you mean. [667]

Q. Now, I would like to go back with you to your testimony of yesterday. There is no question about it, is there, but what Mr. Bassick was made state receiver prior to the reorganization proceeding upon the death of Mr. F. J. Behneman, at the instance of the Bank of California, as the largest creditor of the company?

A. That is true.

Q. Now, you had a conversation with Mr. Bassick in 1936 just before the plan was confirmed.

(Testimony of Charles B. Moores.)

A. Yes.

Q. And you said that if you were elected a director of the company you would consider that the stock should be distributed to those active in the management of the company in proportion to the rehabilitation accomplished.

A. That is true.

Q. But as I understand, at that time you did not discuss under what circumstances the stock should be distributed?

A. No decision was made as to the exact circumstances under which the stock would be distributed.

Q. You could not say at that time in what proportion the stock would be distributed, I think you put it, in advance of results?

A. The results were a prerequisite to any distribution of stock.

Q. At that time had you formulated any fixed idea as to what the results would have to be before the stock would be distributed?

A. Not definitely, no.

Q. Now, just to refresh your recollection on this, Mr. Moores, I will show you a letter of yours of July 12, 1938, addressed to Mr. Bassick.

A. Yes.

Q. You remember that? A. Yes.

Q. And in that letter you refer to a conversation of the day before, and you say, "As stated in our conversation of yesterday, it was contemplated that a five-year period would be necessary to dem-

(Testimony of Charles B. Moores.)

onstrate the success of the plan which can only be measured [668] by the amount of liquidation of indebtedness that has been accomplished at the end of that period. Further provision was made for an extension of five years if, in the opinion of the directors, sufficient progress had been made to warrant continuance of the business beyond that time. It was recognized that the success of this plan depended upon continuity and ability of management. Accordingly, those men in key positions who are willing to remain with the company until such time as the results of their management have demonstrated the success of the plan will be entitled to participate in the distribution proportionately as, in the opinion of the directors, they have contributed to such success. As pointed out to you in conversation yesterday, a transfer of the stock at this time would be an empty gesture, as it has no present value in view of the heavy indebtedness, and a value can only be established by reduction in that indebtedness.”

Those were your views on the matter of stock distribution at that time, were they?

A. Yes, they were.

Q. You were in favor of giving the plan a fair trial to work itself out by going through the whole five-year period?

A. Unless it would solve itself in some other way in the interim.

Q. On that day, July 12, 1938, you felt that the

(Testimony of Charles B. Moores.)

stock had no value? A. Less than no value.

Q. Less than no value?

A. Yes, exactly. There had been accumulated losses in the first three months of that year, and there would be no value of it until there had been a reduction in the indebtedness.

Q. Now, you had another conversation with Mr. Bassick in the end of 1939, or perhaps it might have been early 1940, because [669] you refer to the 1939 statement having been received. I do not imagine that would have been completed until after the first of the year; but in any event, at the end of 1939, Bassick had received extra compensation for that year, had he not? A. Partially, yes.

Q. Well, in your discussion it was indicated from the 1939 statement that the stock had acquired some value.

A. It indicated it had a value which theretofore it had lacked.

Q. Mr. Bassick then asked you if in view of those circumstances it was not time to distribute the stock, and as I understand it you said that the distribution of stock could not be made until the debtor obligations had been taken care of.

A. No, I did not make such a statement.

Q. Well, what did you tell him, then, when he told you he thought the stock should be distributed at that time?

A. Well, the plan contemplated the distribution of the stock, the whole or any part, when conditions

(Testimony of Charles B. Moores.)

justified it, but it was not expedient to do it because of the fact that the creditors still felt they had a major interest in the concern, and wanted control of it until more progress had been made in the reduction of the indebtedness.

Q. You recall that long letter of Mr. Bassick, I think it was dated April 8, 1940, to the board of directors.

Mr. Ferguson: March 18.

Mr. Jordan: Which had all of the figures and reports of conditions in it. I think you testified that you had a talk with him about the time that that letter was received by the board. A. Yes.

Q. And he again wanted additional monetary compensation and was told by you that the cash position of the company at that time [670] would not permit an increase in fixed salary, but you felt that it would be better to defer that matter until the end of that year, December being the usual time when additional compensation had been discussed.

A. That is true.

Q. I believe that you also pointed out at that time that so far as the distribution of stock was concerned that the first five-year period under the plan of reorganization would expire in March of this year and you thought it would be proper to defer any further discussion on stock distribution until that time. A. That is true.

Q. Then you had another talk in June or July, 1940, and Mr. Bassick at that time, I believe, pointed

(Testimony of Charles B. Moores.)

out to you that the big job had been completed successfully at considerable profit to the company, and that he wanted more monetary compensation, and he also inquired about the stock being distributed, and again you told him at that time, if my notes are correct, and you correct me if I am wrong, that it would be better to consider additional compensation at the end of the year, as usual, and that March 24, 1941, the end of the five-year extension period, would be the proper time to consider stock distribution.

A. It would be an expedient time to consider it.

Q. Now, bringing yourself again to the meeting of November 4 of 1940, when the granting of the option was voted, according to the minutes of that meeting you had considerable discussion about the stock distribution, and then it was indicated at least by the minutes that you decided to defer the matter, or further discussion on that subject, until after it was determined whether or not the option would be exercised? A. Yes.

Q. Did the board represent to Mr. Bassick at that meeting if the option was exercised that the stock would be distributed? [671]

A. It did, yes.

Q. Did the board at that time, in the alternative, promise Mr. Bassick that he would get the stock even if the option were not exercised?

A. No, no commitment was made of that sort, except that in general he eventually would receive

(Testimony of Charles B. Moores.)

compensation in the way of distribution of stock for the progress which had been made.

Q. Now, at that point, in November and December, 1940, the Albertie M. Hendy stock having been cancelled, the old stockholders had a beneficial interest in 1907 $\frac{3}{4}$ shares. Is that correct?

A. That is correct.

Q. That was in the voting trust? A. Yes.

Q. Being voted by the directors as voting trustees? A. Yes.

Q. And the directors were also holding 2212 $\frac{1}{2}$ shares which were subsequently distributed to Mr. Bassick, Mr. Hyland, and Mr. Levit after the sale of the plant? A. Yes.

Q. It follows, does it not, that had that stock been distributed to those gentlemen they would have been in control of the company? A. Yes.

Q. And that was something that the creditors did not want?

A. They did not want anybody in control of the company except the creditors.

Q. Until they were paid?

A. Not necessarily until they were paid, but until the five-year period had elapsed, or some method might have been devised to provide proper security for the creditors for which they might be willing to distribute the stock and turn the management over to the new men.

Q. I have forgotten now how long you said yes-

(Testimony of Charles B. Moores.)

terday that you had been connected with the Bank of California.

A. I was not asked that question. I was asked how long I had been cashier. [672]

Q. How long have you been with the bank?

A. Nearly twenty-four years.

Q. That would take you back to about World War Time? A. Yes.

Q. You were acquainted with the Hendy Company at that time, weren't you?

A. Well, I was slightly acquainted with it in 1918; you might say it probably started about 1920.

Q. It is a fact, is it not, that during the World War period, when this country got into the war, and during the post-war period, that the Joshua Hendy Iron Works was doing a tremendous amount of government work? A. I don't know that.

Q. You don't know that?

A. I could tell by referring to the records.

Q. I thought you might know that of your own knowledge.

A. I understood they had made some addition to the plant at that time to build some marine engines.

Q. The appraisal that was made during the re-organization proceedings of the plant, I believe Mr. Ferguson yesterday or the day before read some testimony from the record before Judge Wyman.

Mr. Ferguson: That was before Judge Beasley.

Mr. Jordan: For the purpose of my question it won't make any difference.

(Testimony of Charles B. Moores.)

Q. Was the appraisal made at that time used as a basis for the write-down on the plant that took place in December, 1935?

A. Yes, that appraisal was used as a basis with some adjustments.

Q. With some adjustments? A. Yes.

Q. Was that write-down upon that basis made at your suggestion or direction, or the bank's?

A. No, I do not believe it was. It was made when Mr. Bassick was trustee; presumably it was made at his instance.

Q. But you were constantly in communication with Mr. Bassick [673] during that proceeding?

A. Yes.

Q. Do you know, and if you do not know say so, whether or not the previous valuation before the write-down was based upon the costs?

A. The books did not indicate how it was arrived at. It was based on cost, but some years depreciation had been taken and other years none taken.

Mr. Jordan: I think that is all. Thank you, Mr. Moores.

Redirect Examination

Mr. Ferguson: If your Honor please, I have a few questions. Perhaps these are not proper cross-examination, and to that extent I make Mr. Moores my own witness again.

Q. Mr. Moores, did the directors receive anything in this distribution?

(Testimony of Charles B. Moores.)

A. We paid Mr. Bassick in his capacity as trustee.

Q. Did the directors, as such, receive any compensation?

A. We collected \$10 for attendance at each directors meeting.

Q. No other compensation? A. No.

Q. Did the Bank of California receive any distribution to them other than the payment of the debt which had been scaled down?

A. Nothing other than that.

Q. I notice that for the year ending December 31, 1938 there is a bay in this line of net worth of this company. I wonder if you can explain why that occurred, and whether there is any explanation in that regard that may be made?

A. We lost between \$19,000 and \$20,000 during that year.

Q. That shows upon the annual report?

A. Yes.

Q. Isn't it a fact that during the year that the loss shown upon the books may be explained by the fact that no account had been taken of work which had not been completed?

A. No profit had been taken on the work in progress, no profit was taken until deliveries were made. [674]

Q. In other words, the books were on a cash basis?

A. They were not on a cash basis, but as to work in progress they were.

(Testimony of Charles B. Moores.)

Q. On a cash basis? A. Yes.

Mr. Ferguson: I think that is all.

Mr. Jordan: No further questions.

Mr. Ferguson: If your Honor please, it is understood I may reserve my offer on these exhibits for identification.

The Court: Yes.

F. KNOTT,

called for Defendants and Pettitioners; sworn.

Mr. Ferguson: Q. Mr. Knott, what is your occupation? A. Public accountant.

Q. Are you a certified public accountant?

A. I am.

Q. By whom are you employed, if anyone?

A. John F. Forbes & Co.

Q. How long have you been so employed?

A. By John F. Forbes & Co.?

Q. Yes. A. About six years.

Q. How long have you been a certified public accountant? A. About four years.

Q. How long have you been engaged in accounting? A. About 22 years.

Q. Will you give us, briefly, a general background of what your experience has been?

A. Well, I was employed by Haskins & Sells for fifteen years, and then I joined Forbes & Company.

Q. Now, in the course of your employment by Forbes & Company have you had any occasion to

(Testimony of F. Knott.)

come in contact with the Forbes reports which are in evidence, that is, the reports for the period ending June 30, 1936, Plaintiff's Exhibit 3-A, December 31, 1936, 3-B, [675] December 31, 1937, 3-C, December 31, 1938, 3-D, December 31, 1939, 3-E, November 15, 1940 and December 31, 1940, 3-F. Have you had occasion to examine those reports?

A. I have.

Q. As a matter of fact, you worked on them, did you not? A. Yes, I did.

Q. With particular reference to these reports, do any of these annual reports, Plaintiff's Exhibits 3-A to 3-F contain a balance sheet as of March 24, 1936? A. They do not.

Q. What is the nearest balance sheet that they have as to that date? A. June 30, 1936.

Q. Do any of the reports in evidence show the amount of working capital of the company as of March 24, 1936?

A. They do not, to my knowledge.

Q. Do any of these reports show the amount upon the books of plant and other fixed assets as of March 24, 1936? A. No, they do not.

Q. Can you tell us from the reports what as of March 24, 1936, was the total amount of obligations, that is immediately before the reduction, and I hand you for your convenience some work sheets, and ask you if those work sheets were prepared by you? A. Yes, those were prepared by me.

(Testimony of F. Knott.)

Q. That was prepared from what figures, and on what basis?

A. From the reports of John F. Forbes & Company.

Q. Can you give us, then, the total amount of liabilities of the company, that is, the long term reorganization liabilities before reduction on March 24, 1936?

A. I do not think I understand the question.

Q. On March 24, 1936 there were outstanding before they had been reduced by the plan what amount of obligations of the company, inclusive of interest?

A. Yes, I understand. \$64,732.27. [676]

Q. Do your reports on the books of the company show what the balance of that obligation was after the reduction had been made?

A. Our report does.

Q. You have taken those figures for convenience in testifying here from reports, have you not?

A. Yes.

Q. What is that figure?

A. That is \$568,606.82.

Q. One moment; as of that date has there not been interest accruing on a tax difficulty so that the amount as of that date was slightly larger?

A. Yes, that is correct.

Q. That amount of interest was what?

A. I think it was \$1300.

Q. \$1352.90?

A. That is correct.

(Testimony of F. Knott.)

Q. Making a total then as of March 24, 1936, of \$569,969.72? A. Correct.

Q. Now, this morning before court, Mr. Knott, I handed you certain tabulations or summaries of figures which were taken from the reports and asked you to verify those. Did you have an opportunity to do that? A. Yes, I did.

Q. Referring to Respondents' Exhibit F for Identification, I will ask you whether you have checked those figures against your reports—withdraw that. Your reports are, of course, taken from the books of the company, are they not?

A. Yes.

Q. And correctly reflect those book figures?

A. Yes.

Q. Subject to such notations as you made in your reports? A. That is right.

Q. Now, have you checked Respondents' Exhibit F For Identification, or a copy of that, against the annual reports for the period indicated,—for the period ending September 30, 1940, you have no annual report, and you are not testifying to that figure?

A. That is correct, outside of that the figures are a correct statement. [677]

Q. And your annual reports correctly show those figures as set forth in this exhibit? A. They do.

Q. Now, I will refer you to Respondents' Exhibit G for Identification and will ask you whether you had an opportunity to check those figures as against your reports which are in evidence.

(Testimony of F. Knott.)

A. Yes, I have checked those.

Q. With that exception, the figures outside of October 31, 1940, they were taken by you from your work papers from the books, themselves, were they not? A. Yes.

Q. And are not contained in the reports, themselves? A. Yes.

Q. Are those figures correct and in accordance with your report as taken from your reports?

A. They are, with that exception.

Q. And as to October 31, 1940, this sheet was prepared from reports and from your work sheets and the books of the company, was it not?

A. Yes, it was.

Q. On October 31, 1940 it shows the principal balance to be \$274,966.57. A. It does.

Q. And it shows interest on that date of \$25,264.68? A. Yes.

Q. That makes a total of \$300,231.25?

A. That is correct.

Mr. Ferguson: If your Honor please, I think that I have made sufficient proof, and I now offer these in evidence, that is, Respondents' Exhibits F, and G, together with Respondents' Exhibits H and I, all for Identification, which are taken from the same pages.

Mr. Jordan: No objection.

The Court: They may be admitted and marked.

(Respondents' Exhibits F, G, H, and I for Identification were received in evidence and

(Testimony of F. Knott.)

marked "Respondents' Exhibits F, G, H, and [678] I.")

The Court: We will continue the trial until 2:00 o'clock.

(A recess was here taken until 2:00 o'clock p.m.) [679]

Afternoon Session—2:00 o'Clock P.M.

Mr. Ferguson: If your Honor please, I should like to put on Mr. Moores for a few more questions before resuming with Mr. Knott.

The Court: Very well.

C. B. MOORES,

recalled.

Mr. Ferguson: Q. Mr. Moores, you testified, as I understand it, that you were familiar with the financial affairs of the Joshua Hendy Iron Works during the period involved. A. Yes.

Q. You are familiar with them on March 24, 1936? A. Yes.

Q. And on June 30, 1936? A. Yes.

Q. Was there any substantial difference in the financial condition of the company between those two dates?

A. Practically no change, a matter of a few thousand dollars at the most.

Mr. Ferguson: That is all.

Mr. Jordan: No questions.

F. KNOTT,

recalled;

Direct Examination
(Resumed)

Mr. Ferguson: Q. Mr. Knott, the reports to which you have referred have been offered in evidence. Have you prepared a summary schedule reflecting the financial condition of the Joshua Hendy Iron Works at March 24, 1936? A. No.

Q. What have you prepared by way of a schedule?

A. I have prepared a schedule as of June 30, 1936.

Q. May I have that, please? A. Yes.

Q. These figures are figures reflected in your report dated [680] June 30, 1936, as adjusted by your report of December 31, 1936?

A. That is correct.

Mr. Ferguson: If your Honor please, may I ask that this be marked as Respondents' Exhibit For Identification?

The Court: It may be marked.

(The document was marked "Respondents' Exhibit K, For Identification.")

Mr. Ferguson: Q. Will you explain what your summary of this shows, Mr. Knott?

A. This summary shows the net financial condition, or we might say the deficit of capital at June 30, 1936, of \$31,870.77.

Q. I notice as an approximation of the financial position at March 24, 1936, you have shown the

(Testimony of F. Knott.)

June 30, 1936 figure as representing that figure: Is that right? A. Yes.

Q. The working capital is \$218,514.05, and the subsequent figures represent amounts taken from the June and December reports, so as to reflect the condition on June 30, 1936, is that correct?

A. That is right.

Q. That shows a capital deficiency of \$31,870.77 as of that date, that is, excess of liabilities beyond assets in that amount? A. That is correct.

Mr. Ferguson: I offer this in evidence and ask that it be deemed read. I see no purpose in reading all the figures in evidence.

The Court: So ordered.

(The schedule entitled "Approximation of Financial Condition at March 24, 1936, using balance sheet in John F. Forbes & Co. report as of June 30, 1936 after adjustment shown on report as of December 31, 1936, was marked "Respondents' Exhibit K" in evidence.) [681]

Q. Now, from the Forbes & Company reports in evidence, to which we have referred, have you prepared a summarization of the changes in financial condition between June 30, 1936 and November 15, 1940? A. I have.

Q. May I have that? A. Yes.

Q. Will you explain what this is, please?

A. This is a statement of deficit at June 30, 1936 as shown by our report on August 4, 1936, which

(Testimony of F. Knott.)

covers an audit up to June 30, 1936 and showing the changes from that figure to the corresponding figure at November 15, 1940, that is, the deficit at that date.

Q. When, in the first line, you refer to "Deficit, per audit report dated August 4, 1936," that is for the period ending June 30, 1936, which is Plaintiff's Exhibit 3-A, is that correct?

A. That is correct, that is the report.

Q. So the deficit figure of \$504,287.36 shown in your report is the deficit figure as shown in your report on June 30, 1936?

A. That is right.

Q. And the final figure, Deficit November 15, 1940, of \$76,199.67 represents a comparable figure taken from your November 15, 1940 report in evidence: is that correct?

A. That is correct.

Q. Now, the summarization of those two, and reconciliation of those two represents the change in the financial condition during the period from July 1, 1936 to November 15, 1940?

A. It does.

Mr. Ferguson: If your Honor please, I offer this in evidence as Respondents' Exhibit L.

The Court: Admitted.

(The document was marked "Respondents' Exhibit L.")

Mr. Ferguson: Q. One further question by way of illustration, in your reference to the deficit as shown on the books, [682] does that mean that the par value of the capital stock is that much in excess

(Testimony of F. Knott.)

of the net worth of the company, or the net worth represents the difference between that deficit and the par value of the capital stock? A. Yes.

Mr. Ferguson: That is all.

Cross Examination

Mr. Jordan: Q. Mr. Knot, I believe that Mr. Moores requested you to prepare the answers to the interrogatories that were propounded in this matter by Dr. Behneman and Mrs. Shores?

A. No, not personally.

Q. Not personally? A. No.

Q. Were the answers to the interrogatories prepared under your supervision?

A. They were not.

Q. Who, in that firm, did that work?

A. I have no direct knowledge, but I believe it was one of their other accountants. If you wish his name, it is Mr. Thielmeyer.

Mr. Jordan: So that there may be no misunderstanding, I think the testimony was that most of the basic information was from the books, but I thought Mr. Moores said when he got the interrogatories he turned them over to the accountants and that they had prepared the answers.

Mr. Ferguson: They had prepared the information, I think that was the testimony. I think he testified that the answers were prepared in collaboration between Mr. Moores and myself on the basis of that information.

(Testimony of F. Knott.)

Mr. Jordan: Q. Have you ever seen these answers?

A. Yes, I have seen copies of them, that is the ones that we have.

Mr. Ferguson: You are not referring to the answers of interrogatories as filed?

A. No, the ones that we used.

Mr. Jordan: Q. I am going to show you the original sworn [683] answers to certain interrogatories that were propounded in this matter, sworn to by Mr. Moores, and I am going to particularly direct your attention to Answer 15, appearing on page 11, designated "Answer to Interrogatories No. 20 and 21." Before you read that answer perhaps in fairness to you I should read the question so that you can properly understand.

Mr. Ferguson: If your Honor please, we object to this line of inquiry as not proper cross-examination, not covering any phase of the examination upon which we had Mr. Knott testify, and, in the second place, this witness has furthermore stated he has never seen the answers to the interrogatories before.

The Court: I think the objection is good.

Mr. Jordan: What I was going to do was to ask Mr. Knott to compare the material contained in the answer with the reports which I understand he prepared, to first of all determine whether or not that answer is accurate or not. We have not had an

(Testimony of F. Knott.)

opportunity to examine the man who prepared the material which is set forth there.

The Court: I understand they were prepared by Mr. Ferguson in collaboration with Mr. Moores after the figures were given to him by the Certified Public Accountants.

Mr. Ferguson: That is correct.

Mr. Jordan: I understood Mr. Moores to testify when I interrogated him about the answers the other day that he had turned the interrogatories over to an accountant and he had prepared the answers which he signed.

The Court: My impression is the same as yours.

Mr. Jordan: In that regard I think he said that he turned the questions over to the certified public accountant but I don't know—it now appears that he did not. [684]

The Court: Oh, no. I don't know that he did what you say, that they prepared the answers, but now it appears from Mr. Ferguson's statement that is not what happened, and I take it what Mr. Ferguson says in that regard is true, because it seems to me to be what would naturally follow.

Mr. Jordan: I accept it as true. There is no question about that.

The Court: You probably would do the same thing under the same circumstances.

Mr. Jordan: I undoubtedly would.

The Court: Can you get the witness who made the investigation?

(Testimony of F. Knott.)

Mr. Ferguson: He is, unfortunately, in the Service, he is in the Navy.

The Court: I wonder if Mr. Moores could take the stand and give us some additional light upon this subject, or perhaps we might let down the bars and let Mr. Ferguson take the stand.

Mr. Jordan: Would you like to, Mr. Ferguson?

Mr. Ferguson: I do not profess to be much of an accountant.

Mr. Jordan: I think perhaps I can get at it this way. I am sure you are much better on it than I am.

The Court: As I understand you, you know nothing about these answers at all?

A. No, I merely have read the answers.

Q. You did not supply the figures contained in the answers? A. I did not.

Q. You did no work upon the answers to these interrogatories? A. None, whatever.

The Court: Do you want to put Mr. Moores on the stand again?

Mr. Jordan: If Mr. Moores thinks he can give me any help. As I understood his testimony the other day he did not know much [685] about the answers.

The Court: Do you want to amplify your testimony in that regard, Mr. Moores?

Mr. Moores: I think I can answer any question.

The Court: Would you please take the stand? You may step down, Mr. Knott.

C. B. MOORES,

Recalled for Further Cross-Examination.

Mr. Jordan: Q. Mr. Moores, before I show you these answers I am going to read you the interrogatories so that you will have the questions as well as the answers.

“Interrogatory No. 20: State the amounts of the net profits or losses of the Hendy Co. for the years 1937, 1938, 1939 and 1940, respectively.”

Interrogatory No. 21 reads:

“State the amounts of the non-operating income or losses of the Hendy Co. for the years 1937, 1938, 1939 and 1940 respectively.”

Now, I am going to show you the Answers to those interrogatories which was referred to as Answer No. 15 on page 11, and I am going to particularly call your attention to the figure which is included under the 1940 column here, which is indicated as net income, \$181,839.67. A. Yes.

Mr. Ferguson: You are putting the interrogatories and answers in evidence?

Mr. Jordan: Not in evidence, I am using them for the purpose of impeachment, which I am permitted to do.

The Court: Is there a question pending?

Mr. Jordan: I am waiting for Mr. Moores to refresh his recollection on that answer. [686]

Q. Are you familiar with the details set forth in the answer there?

(Testimony of C. B. Moores.)

A. What is the question?

Q. I am directing your attention to the item of \$181,839.67, referred to as net income for 1940.

A. Yes.

Q. You have also testified that you are familiar with these Forbes statements? A. Yes.

Q. I will ask you if you will reconcile that figure in the answer with the item referred to here as net loss in the December 31, 1940 report of Forbes & Company, Plaintiff's Exhibit 3-A, the net loss being referred to as \$80,690.43?

Mr. Ferguson: If your Honor please, I object to the question on the ground that there is no foundation that has been laid as showing that these are the same things. As a matter of fact, I pointed out when these reports were offered that in some cases the accountants might handle an item differently than that was, and I particularly pointed out this one item which is undoubtedly the figure involved in the cash distribution which was paid to the officers of \$102,729.76. Now, for accounting purposes, the accountants had to put it somewhere, and in our contemplation it is not properly a charge which should be taken from those figures, and there is no reason why they should coincide—there is no reason why the accountant's conclusion as to which column a charge or a credit should come in necessarily binds Mr. Moores in his answers as to whether it is a proper column.

(Testimony of C. B. Moores.)

The Court: It may be that you should have taken the witness stand instead of Mr. Moores.

Mr. Jordan: Q. Do you have any knowledge of this?

A. Yes, Mr. Jordan, I tried to reconcile that particular figure here of the net loss shown by this statement, particularly to [687] surplus charges and surplus credits as those two charges have been figured, and that figure brought no specific relationship, because there are adjustments subsequent to this figure in this report, and there are adjustments subsequent to that figure in your report, in the answer to the interrogatories.

Q. Let me ask you this: As I understand it this figure referred to as Net income for 1940, \$181,839.67, does that mean that the company made that amount of money during 1940?

A. Not from operations, no.

Q. From what did it make that amount of money?

A. It made part of it from the sale of the plant, and part of it from, I believe the profit on the sale of the plant.

Q. That would have been \$131,000?

A. Yes, in round figures.

Mr. Jordan: I think that is all I want from Mr. Moores.

F. KNOTT,

recalled;

Cross Examination
(resumed)

Mr. Jordan: Q. Mr. Knott, the Forbes report reflects a profit on the sale of the Sunnyvale plant of in round figures \$131,000. Was that profit a taxable profit? A. I don't know.

Q. What do you mean you don't know?

A. I have not investigated the report to be able to determine whether it is a taxable profit or not.

Would a profit arrived at under the circumstances that this \$131,000 was arrived at ordinarily be considered as a taxable profit for income tax purposes?

A. I am afraid I could not answer the question, I don't know what the situation is as far as taxable is concerned without investigating it and looking it up. In other words, I could not give you an off-hand opinion as to whether it is taxable or not. I am not familiar [688] enough with the picture there.

Q. Do I understand that you did the work on all of these Forbes reports?

A. I did not.

Q. They were not prepared under your supervision? A. Some of them were.

Q. You don't feel familiar enough, however, with the situation there where the plant was written down in book value so as to result in a profit upon the sale last November of \$131,000 to be able to tell us whether, in your opinion, that would or would not be a taxable profit?

(Testimony of F. Knott.)

A. I am afraid I could not answer that question.

Q. I am afraid maybe I did not make it very intelligible to you.

A. Yes, the question is intelligible, but I say I could not answer that question, because I have not the information upon it.

The Court: The question is clear. I think the witness said he did not know the situation well enough or have the facts before him so that he could answer it.

A. That is correct. It would be merely a matter of opinion which I could not substantiate without some other data.

Mr. Jordan: Q. I am going to show you Respondents' Exhibit F, Mr. Knott, and refer you particularly to the item of \$60,715.14, which appears under the heading "Net Income" as of November 15, 1940. Were all of the liabilities of the company considered in arriving at that profit in making up that statement?

A. All of the known liabilities were included, but this net income is subject to the note which is on the bottom of this statement.

Q. Would you read that note, please, for us?

A. "Note: Net income figures are taken after depreciation and interest deductions, but do not include profits to the company [689] arising from reductions in liabilities, profits on sale of plant, or miscellaneous minor surplus charges or credits."

(Testimony of F. Knott.)

Q. There are no other liabilities other than you have stated?

A. There may have been others; if you will refer to this other statement of the surplus you will find that we have a notation on the bottom of that which refers you to our report of November 15, Exhibit B, page 2.

Q. Would that be Respondents' Exhibit F?

A. I have not the number, that is the summary of financial condition.

Q. Yes.

Mr. Ferguson: No, I think it is Exhibit L.

Mr. Jordan: Q. Did the Hendy Company, if you know, make a tax return for 1940?

A. Well, I have no direct knowledge, but I assume that it would make a return. I have no direct knowledge of that, however.

Q. You had nothing to do with the preparation of such a return? A. No.

Q. Can you tell approximately from these reports what the current position of the Hendy Company was on the first of November, 1940 as to accounts receivable and cash?

A. No, we could only tell to November 15

Q. Only November 15?

A. Only November 15. The October figures were inserted, as Mr. Ferguson stated before when I answered the question, they were inserted by me as a memorandum.

Q. Let me ask you this: In view of your famil-

(Testimony of F. Knott.)

ilarity with the financial condition of this company, would you say that it would have been possible at a date immediately prior to the sale of the Sunnyvale plant for the company to have paid additional compensation or bonuses in the amount of approximately \$103,000?

Mr. Ferguson: Will you pardon me, do I understand that [690] question is directed to paying out the cash?

Mr. Jordan: In a condition to pay it.

Mr. Ferguson: Pay how much?

Mr. Jordan: \$103,000.

Mr. Ferguson: Cash or otherwise?

Mr. Jordan: Cash, that is what was paid on or about the 4th of December, 1940.

A. Will you restate that question? I do not quite get what you are getting at.

Q. I am afraid I do not state things very well, but be that as it may, what I am trying to find out is was the Hendy Company financially in a condition to pay out \$103,000, approximately, to various of its employees and officers immediately prior to the sale of the Sunnyvale plant, which would have been the early part of November, 1940; in other words, prior to November 15, of that year?

A. I would not know.

Q. You would not know that? A. No.

The Court: I was wondering how he could answer that question.

Mr. Jordan: Q. Would they have enough cash to pay?

(Testimony of F. Knott.)

A. In the first place, I don't know what cash they had without referring to the November 1 report, which is the one you referred to.

Q. The November 15.

A. In the second place, the possibilities of paying out money is dependent entirely upon business conditions.

The Court: Q. In the judgment of the directors, too?

A. In the judgment of the directors, too.

The Court: Mr. Ferguson, do you know how much money, how much cash the company had on hand at the time Mr. Jordan is inquiring about?

Mr. Ferguson: No, I do not, if your Honor please. As I [691] said when we introduced the September 31 balance sheet that was the closest balance sheet, pro forma sheet, that we had to the November 15 report. The November 15 report, of course, reflects any cash deposits as the proceeds of the sale. That is why I put the September 31 sheet in as being the nearest I could find.

The Court: Did Mr. Moores say anything in that respect?

Mr. Ferguson: Mr. Moores stated there would not be enough cash.

The Court: I suppose that is a fact, is it not?

Mr. Jordan: I do not think it could be denied. I think that is all.

Mr. Ferguson: That is all.

ALFRED J. MAYMAN,

recalled.

Mr. Ferguson: Q. Mr. Mayman, were you in court this morning?

A. Yes, I was, Mr. Ferguson, but I was a little late.

Q. Did you happen to hear Mr. Jordan's interrogation of Mr. Moores with respect to the letter addressed to the stockholders, dated November 13, 1940?

A. Yes, I heard that.

Q. And referring to that letter set forth in the meeting of the stockholders held on November 15, 1940, do you recall that?

A. Yes. I thought it was the meeting of November 4.

Q. You may refresh your recollection. The meeting of the stockholders November 15, 1940 sets it forth, does it not?

A. Wouldn't it be the meeting of the 4th of November?

Q. I think the directors meeting of November 4 directed that this letter of November 13, 1940 be sent. Did you, as Secretary, mail this letter to the then existing beneficial certificate [692] holders?

A. Yes.

Q. You mailed them on November 13, 1940?

A. That is my best recollection, I am not sure of the date, but I think that was the date.

Q. And according to the minutes, you were present at this meeting on November 15. That is the fact?

A. Yes, that is the fact.

(Testimony of Alfred J. Mayman.)

Q. Was any protest or any objection to the trustees' approval of the sale then made?

A. There was no protest made then nor did I hear, as Secretary of the Company, by registered mail or otherwise, from any of the beneficial owners.

Mr. Ferguson: That is all.

Mr. Jordan: No questions.

J. T. KRUEGER,

called for Defendants and Petitioners; sworn.

Mr. Ferguson: Q. Where do you reside, Mr. Krueger? A. Berkeley, California.

Q. What is your occupation?

A. I am a certified public accountant.

Q. By whom are you employed, or with whom are you associated?

Mr. Jordan: Mr. Ferguson, I will be glad to stipulate to Mr. Krueger's qualifications.

Mr. Ferguson: Q. You are a partner of Forbes & Company, I understand? A. I am.

Q. Are you familiar with the reports of Forbes & Company which are in evidence, those being the reports for the period ending June 30, 1936, December 31, 1936, December 31, 1937, December 31, 1938, December 31, 1939, November 15, 1940, and December 31, 1940, being Respondents' Exhibits 3-A to 3-F, inclusive?

A. I am generally familiar with all of those.

(Testimony of J. T. Krueger.)

Q. Was the preparation of those reports under your general super- [693] vision?

A. All of them.

Q. Now, in connection with your familiarity, did you have occasion to be familiar with the write-down of the assets that took place in December, 1935?

A. Yes, I am familiar with the write-down.

Q. You are familiar with the reports in that connection?

A. I am.

Q. In your opinion as an accountant, did that write-down represent a mere bookkeeping adjustment on the part of the company?

A. No, it did not. It was an effort on the part of the management and of their accountants, the firm with which I am associated, to reflect the conclusions reached in connection with the plan of reorganization, or, more specifically, it was an effort to set forth as accurately as possible, the financial condition of the company at or about that time.

Q. And in your opinion the write-down did do that, it accomplished that?

A. Am I allowed some latitude?

Q. I wish you would explain your answer.

The Court: Explain your answer if you wish.

A. Briefly, the situation was this, when we undertook the first engagement as a result of which we rendered a reprot dated August 4, 1936, covering the fifteen-month period from April 1, 1935 to June 30, 1936, we had access not only to the books

(Testimony of J. T. Krueger.)

of account, but we had access also to copies of the plan of reorganization which had been approved by the Court, and disseminated to all interested parties; we had access also to a report compiled by a gentleman by the name of Bourne, as I recall, I have not seen the report recently, so I am calling on my memory of the printed plan of reorganization which was disseminated, and, according to my understanding, approved by the Court, and also from the auditor's report it appeared that, reference was made that there had been [694] no consistent depreciation period, that in some years no deductions were made for depreciation, some years round sums were deducted, and still other years odd amounts which could not be substantiated, by which I had no way to determine how they were computed. Furthermore, there was some reference to the fact that quite possibly additions had been made in the accounts to property which did not replace capital additions, and with all of that in mind Mr. Bassick, the trustee, called upon an appraisal engineer, Mr. J. A. Smiley, to make an appraisal of the property at or about the date the plan of reorganization became effective, and in view of all of the uncertainty as to the significance of the book figures it was deemed advisable by all concerned to accept as correct the value set forth by this appraisal engineer. I might state also that we not only were engaged at that time to make an audit of the accounts, but we were also engaged to see that the books of ac-

(Testimony of J. T. Krueger.)

count reflected the plan of reorganization, and in connection with our work we did so feel that the books reflected the conclusions reached in the plan of reorganization. I might say further with respect to that matter, if I am not going too far in my answer to the question, that these appraisal values have since been used as a basis of Federal tax return, and while it is true that the company has had some adjustment with respect to revamping that, I understand those values have been accepted by the Treasury Department.

Mr. Ferguson: That is all.

Cross Examination

Mr. Jordan: Q. Mr. Krueger, how much depreciation, in your opinion should have been deducted and was not?

A. I could not answer that question, because we have no way of telling from the data available as to the cost of the assets then [695] in existence. It was our understanding from the data available to us this \$724,000 was a figure which had no accounting significance. That was the reason for having an appraisal made, or one of the reasons for having an appraisal made.

Q. Was the appraisal value used as the new value?

A. No, the appraisal value was worked out, first of all, on the basis of historical cost, accrued depreciation to that date, and the resultant figure of historical cost less depreciation.

(Testimony of J. T. Krueger.)

Q. How much expense has been capitalized?

A. I don't know that any was capitalized for that matter. I think that statement was made in the report of the prior auditor. Personally, we did not go into those early records.

Q. What was the amount of the obsolescence that was taken?

A. I do not believe that I stated there had been any taken. I believe it should have stated in the reports as to whether there was any obsolescence. I do not know as to the amount, if any.

Q. In adjusting the appraisal what was done with capital additions in the past as additions to the historical cost?

A. I am not quite sure that I understand your question, but starting with that basis, we took Mr. Smiley's appraisal, setting up a historical cost and to that was added any additions subsequent to the date of his appraisal. I am not sure that I answered your question, but that is as close as I can come to it.

Q. Tell me this, was the reduced value of the plant used as a basis in connection with the sale in order to arrive at a taxable profit, or was there a taxable profit involved in the sale?

A. That is a rather complicated matter, Mr. Jordan, and without better details I would hate to be too specific. I might say, in general, the amount of tax payable would depend on [696] the period of time held by the owners and so on. I would hesitate, without referring to the record, to set forth

(Testimony of J. T. Krueger.)

even a general idea of what the tax liability would be. However, I might state in determining the amount of profit, if that is what you are attempting to develop, in determining the amount of profit which might or might not be subject to Federal tax, that computation is based upon an appraised value.

Q. Did your firm prepare the 1940 return of the company? A. We did.

Q. Was that \$131,000, approximately, returned as a profit in the return?

A. I would have to examine the return to state specifically on that; as I attempted to bring out before in connection with sales of so-called capital assets, there is a rather complicated formula for determining just which type of property was subject to tax, and those which are not. Frankly, from memory I could not give you the pertinent sections of that statute.

Q. In other words, you don't know whether or not, for tax purposes, that \$131,000 of profit so-called, out of the sale, was put into the return as such and tax paid on it?

A. It was put in the return as such. I wish to repeat that I don't know whether the tax was paid on the full \$131,000. However, such portion of it as was taxable under the Code was included in the 1940 return as a profit subject to tax.

Redirect Examination

Mr. Ferguson: Q. When you referred to Mr.

(Testimony of J. T. Krueger.)

Smiley's appraisal as historical value, that was the depreciated historical value, was it not?

A. I think I referred to it as the historical cost.

Q. Depreciated, was it not?

A. No, that was his best estimate [697] of what the machinery cost originally.

Q. Oh, yes, I understand.

The Court: We will take a recess for a few minutes.

(After recess:)

Mr. Ferguson: If your Honor please, the Defendants and Petitioners rest.

Mr. Jordan: I wonder if I might ask Mr. Krueger just two questions.

The Court: All right.

J. T. KRUEGER,
recalled;

Recross Examination

Mr. Jordan: Q. All of the reports of John F. Forbes & Company that have been introduced in evidence in this case were signed by you, Mr. Krueger?

A. They were all reviewed by me. Whether I manually signed them all I could not say at this time.

Q. In any event, you supervised the preparation of them in each instance? A. I did.

(Testimony of J. T. Krueger.)

Q. And those reports represent your opinion as to the proper statement of the affairs of The Joshua Hendy Iron Works, now Hendy Realization Company during the period in question, from March 24, 1936 to the end of December, 1940?

A. At the respective dates, yes.

Mr. Jordan: That is all.

Mr. Ferguson: No questions.

Mr. Jordan: Plaintiff has a brief amount of rebuttal, your Honor. Is there any objection to introducing this in evidence? (handing)

Mr. Ferguson: I don't think it is binding on any of the defendants. [698]

The Court: What is it?

Mr. Jordan: It is a letter that was written to myself by Mr. Ferguson on March 7, 1940, and it goes to the question of the value of the stock of this company at that date. We have had a great deal of evidence here in the form of letters and I consider this just as material as any of the rest of them are. I would like to read it into the record.

Mr. Ferguson: If your Honor please, the purport of that letter was in regard to some stock certificates Mr. Behneman had lost, and the question was whether a bond would have to be put up, and I wrote him and gave him my view as to what the

value of that stock was. That was not binding on the defendants.

The Court: I was wondering if you knew what the value of the stock was.

Mr. Jordan: Perhaps I can submit the letter to your Honor and you can determine whether it would be proper.

Mr. Ferguson: I have no objection to the letter being shown to the Court.

The Court: If you want to put it in evidence it may go in.

Mr. Jordan: I will offer it in evidence as Plaintiff's Exhibit next in order.

The Court: It may be admitted and deemed read into evidence.

(The letter was marked

“PLAINTIFF'S EXHIBIT 7,”

and is as follows:

“Law Offices of
Stanley Pedder and Kenneth Ferguson
405 Montgomery Street,
San Francisco

“March 7, 1940

“Mr. Paul S. Jordan,
Attorney at Law,
Russ Building,
San Francisco, California. [699]

“Dear Paul:

“We have your letter of March 6, 1940, inquiring as to the value of the stock of The Joshua Hendy Iron Works as the basis for pro-

curing an indemnity bond to indemnify The Joshua Hendy Iron Works in the issuance of Trustees' Certificate against 304½ shares of its stock to be surrendered to it, now standing in the name of F. J. Behneman, but owned by Dr. Harold M. F. Behneman.

“We have discussed this matter with the President of the Company, but are advised by him that it is impossible to allocate any particular value to the stock. While the Company's affairs are much improved, it still has substantial outstanding obligations and it is therefore impossible to hazard an opinion as to what the stock may be worth. Its value at the present time is obviously not its par value, but I am afraid that under the circumstances the par value is all that we can rely upon for this purpose.

“Should you have any trouble in procuring a bond upon this basis, if you will communicate with Mr. Robert Pedder of our office, who will be handling this matter in my absence during the next few weeks, we will be glad to do anything that we can in order to work out the situation.

“With kindest personal regards of the writer, we are

“Yours very truly,

STANLEY PEDDER AND
KENNETH FERGUSON

. By KENNETH FERGUSON.”)

Mr. Jordan: I will call Mr. Gane. [700]

ROBERT M. GANE,

recalled by Plaintiff and Respondents in Rebuttal.

The Witness: Your Honor, before any questions are asked I would like to refer to a figure that I used in testifying previously, which I over-stated somewhat. I do not think it is material, but for the purpose of the record perhaps I should correct it.

The Court: Very well, you may, if you wish.

A. In reference to the write-down of the plant assets I referred to the amount as \$399,000, whereas the report showed that to have been \$350,000 or \$320,000. One report shows one figure and the other shows the other figure.

Mr. Jordan: Q. You are referring now to Plaintiff's Exhibit 4, Approximation of financial position at March 24, 1936, are you?

A. No, I am referring to the Forbes Report, and I used the figure from memory, without specifying it as being accurate, but merely because it was over-stated. It might be better if the record was clear on that point.

Q. Mr. Gane, I am going to show you Respondents' Exhibit F,—I believe you have seen it before—and ask you to look at it. I believe you have a copy of it that I furnished you. Can you explain the difference, if any, between the figures which you gave the Court on your direct examination in

(Testimony of Robert M. Gane.)

connection with the Plaintiff's case in chief and those submitted in Respondents' Exhibit F?

Mr. Ferguson: One moment, I object to this line of inquiry as not proper rebuttal, it is calling for an opinion. If there is any contention that these figures in Exhibit F do not accurately reflect the books, he can offer the books.

The Court: Objection sustained. [701]

Mr. Jordan: I was going to ask the same question with respect to Respondents' Exhibit G. I presume the ruling would be the same?

The Court: Yes. I think that the objection, that it is calling for an opinion, is good, Mr. Jordan.

Mr. Jordan: May I ask him a question as to that?

The Court: Make your offer.

Mr. Jordan: Q. I will show you Respondents' Exhibit G, Mr. Gane. Do you recall that statement?

A. Yes.

Q. I am going to ask you, referring to that exhibit, how do the figures there set forth agree with the testimony which you gave on your direct examination?

Mr. Ferguson: The same objection, if your Honor please.

The Court: Sustained.

Mr. Jordan: Q. I am going to show you the original answers to interrogatories propounded in this matter, Mr. Gane, sworn to by Mr. Moores. You have previously examined these answers, have you not? A. I have.

(Testimony of Robert M. Gane.)

Q. I am also going to show you the Forbes statement of December 31, 1940, Plaintiff's Exhibit No. 3. You have also examined that statement?

A. I have.

Q. Now, I will ask you first to refer to Answer 15, which refers to net income of \$181,839.67 for 1940, and also ask you to refer to the reference to net loss shown on December 31, 1940, Forbes Report, and ask you to state whether or not it is possible to reconcile those two figures?

Mr. Ferguson: The same objection, and the additional objection it constitutes an argument.

The Court: Sustained.

Mr. Jordan: That is all, Mr. Gane. [702]

Mr. Ferguson: All of the questions were objected to and the objections were sustained. No questions.

Mr. Jordan: That is the Plaintiff's case, your Honor.

The Court: Are you ready to argue the matter now?

Mr. Jordan: I would be perfectly willing to argue the matter if your Honor wishes, orally, or, if your Honor would permit, submit a memorandum.

The Court: No, I think I would like to hear you argue the matter. I was wondering if you are prepared to do that now.

Mr. Jordan: There has been quite a mass of facts gone into the record here. I think, for my-

self, that I would appreciate an opportunity to sort of correlate those facts.

The Court: Would it meet your approval if I would continue it until next Tuesday morning at ten o'clock, and I will allow an hour on each side for argument.

Mr. Jordan: Thank you very much.

Mr. Ferguson: That is entirely agreeable to us.

[Endorsed]: Filed March 12, 1942. [703]

[Endorsed]: No. 10085. United States Circuit Court of Appeals for the Ninth Circuit. Gladys M. Shores and Harold M. F. Behneman, Appellants, vs. Hendy Realization Co., a corporation, (formerly The Joshua Hendy Iron Works,) A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and Morris Levit, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 13, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States
Circuit Court of Appeals

For the Ninth Circuit.

GLADYS M. SHORES and HAROLD M. F.
BEHNEMAN,

Appellants,

vs.

HENDY REALIZATION CO., a corporation
(formerly THE JOSHUA HENDY IRON
WORKS), A. J. MAYMAN, C. B. MOORES,
E. PRICE, A. E. WEBBER and W. R.
BASSICK, individually and as the Directors of
Hendy Realization Co., ELMER M. HYLAND
and MORRIS LEVIT,

Appellees.

Supplemental Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

In the Southern Division of the District Court of
the United States for the Northern District
of California

Before Hon. Burton J. Wyman, Special Master
No. 25937-S

In the Matter of THE JOSHUA HENDY IRON
WORKS, a corporation,
Debtor.

BRIEF OF HAROLD M. F. BEHNEMAN
ON OBJECTIONS TO PLAN OF
REORGANIZATION

The Court Has No Power or Authority to Approve
Subdivision G (2) of the Proposed Plan
of Reorganization

This portion of the plan of reorganization provides for the compulsory surrender of fifty per cent of the shares by each stockholder to the Board of Directors to be given by it to other individuals under the guise of corporate reorganization. We believe it will be granted that the only plan of reorganization which a court can approve, insofar as stockholders are concerned, is the plan which is specified in 77b of the Act and this is as follows:

“A plan of reorganization within the meaning of this section; (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either

through the issuance of new securities of any character or otherwise.” [1]

We submit that the rights of stockholders are not altered or modified by taking the shares away from one and giving them to another or in other words by merely changing the personnel of the stockholders. It is our conception that stockholders have no rights except those which are incident to the shares and unless the shares are changed or modified in some particular the rights of stockholders have not been altered or modified. Showing that this is the correct fundamental conception of the “rights of stockholders” we quote from *Winslow vs. Fletcher* (Conn) 4 Atl. 250 at 253:

“The stock of a corporation, says Mr. Lowell ‘may be defined as the sum of all the rights and duties of stockholders. . . . Each share, therefore, is but a fraction of all the rights and duties which compose this sum.’ ”

Under Section 77b, voting rights of stock might be modified or altered, dividend rights might be changed and Series A stock might be relegated to the position of a Series B. Even G (1) of this plan might be considered an alteration or modification of the rights of stockholders which provides that the voting power shall be transferred to the Board of Directors for a given number of years. But the rights of stockholders are not modified or altered by merely changing the personnel of the stockholders; the corporation has the same number of shares

outstanding, the same dividend rights are outstanding and the same voting rights are outstanding. We submit that this plan G (2) has no relation whatever to a corporate reorganization which necessarily presupposes a change in its corporate structure or in its financial situation. This plan G (2) looks like an attempted reorganization of the stockholders. If a plan for corporate reorganization can force a stockholder to give his shares to a third person then it could force a creditor to give a portion of his indebtedness to a third person or a bondholder to give some of his bonds to a third person. [2] It seems to us if this is the construction to be given 77b then it is unconstitutional, as it would be depriving a stockholder or a creditor or a bondholder of his property without due process of law. Section 77b partakes of the nature of an act for debtor's relief and this plan imposed upon the stockholders in no way relieves the debtor corporation.

If we measure this provision of 77b by the well known canons of construction we believe we will come to the same conclusion. We have a principle of construction known as "ejusdem generis" which is defined in 19 C. J. page 1255 as follows:

"A well known maxim of construction to aid in ascertaining the meaning of a statute or other written instrument, the doctrine being that where an enumeration of specific things is followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind."

Section 77b provides that the rights of stockholders may be modified or altered. How? "Either through the issuance of new securities of any character or otherwise". Here we have a statement that the rights of stockholders may be modified or altered by a modification of the security. The general phrase "or otherwise" takes on the character of the particular. The words "or otherwise", as so used, are distinctly held to take upon the character of the particular in the case of *People vs. McKean*, 76 Cal. App. 114, where it is held that the term "or otherwise", in the provision of Section 317 of the Penal Code that every person who wilfully offers his services "by any notice, advertisement or otherwise" to assist in the production or facilitation of a miscarriage or abortion is guilty of a felony, should be construed as signifying other like means, namely, other means which are of the same general nature or class as those notices which are akin to advertisements. The court in that case says (p. 121): [3]

"But we venture to assert that no authority can be found where the general words 'or otherwise' when following particular and specific words, have been construed as having their unrestricted sense where such a construction would cause the preceding particular words as well as the general words to become meaningless surplusage. And yet that is precisely the result which must inevitably follow if the words 'or otherwise', as used in Section 317 be given

their full unrestricted meaning. That is to say, if the words, 'or otherwise' be not construed as meaning 'other such like means,' then the whole phrase 'by any notice, advertisement, or otherwise' becomes mere barren verbiage, sterile of effect."

In construing Section 77b, if the words "or otherwise" are to be taken in an unlimited sense then why did the Act of Congress not specify that the rights of stockholders might be modified in *any particular*;* and, if it is to be construed as meaning that the property of stockholders may be taken away and given to third persons, why did it not provide that the rights of the *present* stockholders might be modified?

We submit, therefore, that 77b is not to be construed as giving the right to this court to deprive any stockholder of his stock and compel him to give it to third persons; and, if it is to be so construed, then it is unconstitutional because it deprives a person of his property without due process of law. Such an act so construed is not one for the relief of debtors and has no relation whatever to a corporate reorganization.

G (2) of the Plan Should Not Be Approved Because It Is Not Fair and Equitable

The Act provides that the court shall approve the plan of reorganization if it is fair and equitable. In this particular case Harold M. F. Behneman,

*Italics are in original.

who filed this objection is the largest stockholder, owning and holding 1,244½ shares out of a total of 4,425 shares issued. The only other two large stockholders are the estate of Mrs. M. F. McGurn, owning and holding 861½ shares and Mrs. A. M. Hendy, owning and holding 969½ shares. [4] Without the consent of the estate of McGurn the requisite consent could not have been obtained and although the executor of this estate testified in effect that he voluntarily signed this consent the surrounding circumstances are such as to indicate that he was not entirely a free agent. All of these shares belonging to the McGurn estate are pledged to the Bank of California and the executor testified that under the circumstances he did not care to run contrary to the will of the Bank of California. Was it not peculiar to say the least that he did not communicate with the attorney for the estate; that he did not request the attorney for the estate to get an order of the probate court allowing the executor to approve the plan? Was it not peculiar that when he was asked why he did not ask the attorney for the estate to attend to it his reply was simply that "he didn't know." Here we have a plan to take away fifty per cent of the shares of Harold M. F. Behneman and to give it to the Board of Directors (which it is obvious will be entirely controlled by the Bank of California, a secured creditor) and to be by the Board given to third persons "in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for

management and the successful rehabilitation of the company's affairs." It is to be assumed that the managing officers will be paid their salaries; and we submit that they should be rewarded from the assets of the company. Why should this supposed extra reward be taken out of the pockets of the stockholders? Why not take some of this supposed reward from the security held by the Bank of California?

Again what is meant by "successful rehabilitation of the company's affairs?". It is meaningless as it stands and is undefined. Does it mean when the company is on a dividend paying basis? Does it mean when the creditors are paid, or what does [5] it mean? Apparently this also is to be left "in the sole discretion" of a Board of Directors wholly dominated by a secured creditor.

We therefore respectfully submit that this portion of the plan known as G (2) should be rejected and should not be approved by the court, first, because it is not a thing which is contemplated by the statute and, second, because it is not fair and is unjust.

Dated: January 6, 1936.

BYRNE, LAMSON & JORDAN

Attorneys for objecting stockholder Harold M. F.
Behneman

(Admission of Service)

[Endorsed]: Filed with Spl Mster Jan. 6, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [6]

[Title of District Court and Cause.—No. 25937-S.]

MEMORANDUM OF POINTS AND AUTHORITIES OF W. R. BASSICK, TRUSTEE, AS AMICUS CURIAE, ON FURTHER HEARING UPON PROPOSED PLAN OF REORGANIZATION

At the hearing heretofore had upon the proposed plan of reorganization of the debtor (The Joshua Hendy Iron Works), Harold M. F. Behneman, a stockholder, by Leo D. Byrne, Esq., his attorney, argued that paragraph G of the proposed plan does not “modify” the rights of the debtor’s stockholders within the purview of Section 77B of the Bankruptcy Act. W. R. Bassick, trustee for the debtor, is obviously concerned with the proposed [7] plan only insofar as it is fair and for the apparent advantage of the debtor, and the ultimate support of the proposed plan naturally rests with the stockholders and creditors who have presented and accepted it. Inasmuch, however, as the trustee has testified, at earlier hearings, that he believes the proposed plan fair and feasible, and for the benefit of all interested parties, he, amicus curiae, presents this memorandum for the information, assistance, and consideration of the court.

If Section G of the Proposed Plan Is Within the Purview of Section 77B, Behneman’s Objection Is Immaterial.

a. The debtor is insolvent.

It was conceded by Behneman and all others pres-

ent at the hearing held on October 22, 1935, that the debtor is insolvent. The effect of such insolvency is to eliminate the necessity of acceptance of the proposed plan by a majority of the stockholders, and to make Behneman's objection immaterial.

Bankruptcy Act, Section 77B, subdivision (e)(1);

In re William Penn Garage (District Court, Western District of Pennsylvania, October 7, 1935) reported in C. C. H. Bankruptcy Service, paragraph 3649;

In re Continental Cigar Company (District Court, Northern District of Pennsylvania, October 30, 1935) reported in C. C. H. Bankruptcy Service, paragraph 3652.

In the reorganization of the William Penn Garage, *supra*, the court said:

"It is not necessary that provision be made in the plan for stockholders where the debtor is insolvent as is the fact in this case, nor is it necessary that provision be made for junior lien creditors where the lien of such creditors is of no value."

Again, in the reorganization of the Continental Cigar Company, *supra*, the court said: [8]

"Exceptions by a minority stockholder to the findings and report of the Special Master recommending that the plan of reorganization be

confirmed by the court. The Special Master found that the debtor is insolvent; that the plan of reorganization was approved by creditors holding two-thirds in amount of unsecured claims, being two-thirds in amount of each class of claims which have been allowed and would be affected by the reorganization; that acceptances have also been filed on behalf of stockholders holding a majority of each class of stock; that the plan of reorganization is fair, equitable, and feasible; that the plan has been accepted as required by the provisions of Section 77B; and that the offer and acceptance of the plan have been made in good faith. The only objection to the confirmation of the plan has been made by a minority stockholder. If the finding is correct that the debtor is insolvent, the stockholders are not affected by the plan, and insolvency eliminates the necessity for acceptance by a majority of the stockholders as a prerequisite to confirmation of the plan.

“The Special Master, upon consideration of the testimony, the appraisal, and schedule of liabilities, found that the debtor was insolvent. The court is of the opinion that the finding of insolvency as well as the other findings of the Special Master are correct and that the exceptions to the confirmation of the reorganization plan are without merit.”

- b. A majority of the stockholders of the debtor have accepted the proposed plan.

Even if the debtor were not insolvent, Behneman's objection is still immaterial, because the proposed plan of reorganization has been accepted, by verified acceptances on file with the Special Master, by stockholders holding more than a majority of the capital stock of the debtor, i. e., by stockholders holding 65.26%. The verified acceptances of stockholders and creditors of every class are, in fact, on file in numbers exceeding the percentages required by Section 77b, i. e., by the "Class A" creditor, The United States of America, 100%; by "Class B" creditors, 94.05%; by the "Class C" creditor, 100%; by the "Class D" creditor, 100%; by "Class E" creditors, 69.02%; and by "Class G" stockholders, as above noted, 65.26%.

In order to be entitled to any consideration, therefore, [9] Behneman must establish that the provisions of paragraph G of the proposed plan are not within the provisions of Section 77B. Such is, however, neither the law nor the fact.

Paragraph G of the Proposed Plan Is Within
the Purview of Section 77B.

Subdivision (b) of Section 77B, upon which Behneman's contention is based, provides as follows:

"(b) A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of

creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions MODIFYING or ALTERING the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character OR OTHERWISE: * * *” (emphasis ours)

It is submitted that the language of this section is plain and unambiguous, and means exactly what it says. Within the authority of this provision, it is clearly established that where there is no equity for stockholders, as is the case here, the stockholders may be wholly wiped out.

In re William Penn Garage, *supra*.

In re Central Funding Corporation; Union Trust Co. vs. Wagner (Circuit Court of Appeals for the 2nd Circuit of New York, February 11, 1935, Augustus Hand, Judge) reported in C. C. H. Bankruptcy Service, paragraph 3229.

Since the court has power, by means of reorganization, to wipe the stockholders out entirely, a fortiori it has power to modify or alter their rights to some lesser extent.

Thus, in the reorganization of the Consolidation Coal Company (In Re Consolidation Coal Company (District Court of Maryland, July 10, 1935) re-

ported in C. C. H. Bankruptcy Service, paragraph 3538); the court upheld a plan of reorganization which provided that common stockholders should receive warrants which, [10] upon the payment of \$25.00 per share, would entitle them to acquire new common stock, it being provided that if the stockholders should not exercise such warrants, by the payment of such additional amount, that they should receive nothing. In such connection the court said:

“The question before the court is whether the plan of reorganization, proposed by creditors of the Consolidation Coal Company should be approved.

“These objections may be summarized as being two-fold: the primary objection is raised by the owners of some 40,000 shares of the common stock of the company who—without having presented any single, concrete plan, except to ask for some stock, without having to pay for it, or some sort of junior security,—assert that the common stockholders have been unjustly discriminated against by the allotment to them of warrants, giving them merely the right to subscribe to the new common stock at \$25.00 a share, which will be hereafter referred to.”

The court then refers to the other contention, asserted by certain bondholders, that Section 77B is unconstitutional; denying such contention upon

the authority of *Campbell vs. Alleghany Corporation*, 75 Fed. 2nd 947.

Discussing the plan of reorganization, and finding it fair etc., and noting that altho the assets are carried upon the books at \$60,000,000.00 they have, in all probability, a value of not to exceed \$33,000,000.00, the court concluded:

“The court believes that the value of approximately \$33,000,000.00 placed upon the company’s assets is sufficiently accurate for the purposes of these proceedings.

“What has already been said would seem to be a sufficient answer to the contention of the objecting common stockholders that they should be accorded greater rights, but if the position of the bondholders be further analyzed, the evidence is even more convincing against this contention, and to the effect that there is no real equity for the old common stockholders. That is to say, if we take into account the funded debt and the interest thereon in arrears, the collateral notes and the preferred stock and the dividends thereon in arrears, we find the company has a total debt due to the bondholders senior to the common stock of more than \$46,000,000.00.” [11]

Under these circumstances, the court found that the common stockholders in receiving warrants, were being treated fairly.

It may be noted, in passing, that in this case the

court approved a plan of management of the reorganized corporation almost identical with that proposed in the present plan, providing that for five years the management should repose in five trustees selected by the creditors, each group having a representation on the Board.

Again, in *In Re Central Funding Corporation; Union Trust Co. vs. Wagner*, *supra*, the court, holding that Section 77B is constitutional, that a plan of reorganization may cover property in which the debtor has no equity, and that a plan of reorganization is not improper because it liquidates the interest of bondholders over a ten year period, said:

“The appellant earnestly contends that the plan is not a reorganization within the meaning of Section 77B. We cannot, however, doubt that it is within the general meaning of the word “reorganization”. In common parlance that word is not limited to cases where the rights of all persons interested in a corporation, whether lienors, general creditors or stockholders, are made to survive under some new corporate arrangement. Not infrequently the rights of some of these classes have become so worthless that they deserve and receive no recognition in the reorganization. Judge Baker recognized this when he said in his opinion in *Investment Registry vs. Chicago & M. E. R. Co.*, 212 Fed., 594, 609, that:

‘Reorganization * * * means, usually, that the equity of the stockholders, if any ever

existed in actual value, has vanished; that the property virtually belongs in equity to the bondholders; and that, if the bondholders will combine for the mutual protection of their equal interests, they will have a practical monopoly of the bidding.'

"A 'reorganization' does not necessarily presuppose the survival of the rights of stockholders or even of junior creditors, when they have become worthless, but may be a readjustment of the rights of lienors under a new corporate structure. While this has generally been effected through foreclosure sales, such has not always [12] been the method, and Section 77B was evidently inserted in the Bankruptcy Act in order among other things to facilitate corporate readjustments without the delay, complexity and difficulty inherent in the cumbersome methods that were formerly regarded as necessary."

Noting that Section 77B covers insolvent debtors as well as debtors merely "unable to meet their debts as they mature" the court expressly cites subdivision (b)(1) and (2), concluding:

"Thus a plan of reorganization may or may not provide for an issuance of new securities to stockholders."

Under the proposed plan in this case all of the creditors have modified their rights, scaled down their indebtednesses, decreased interest rates, and

extended maturity dates. Not only is it proper for the proposed plan to provide for a similar scaling down by the stockholders, but it would be improper for the plan not to so provide. In an article in 30 *Illinois Law Review* 137, commenting upon Section 77B, this principle is affirmed as follows:

“To require no sacrifices whatsoever of stockholders while decreasing interest rate, extending the maturity date or otherwise affecting the rights of creditors will constitute a direct controvention of the doctrine of *Northern Pacific Railway vs. Boyd*, 228 U. S. 482.”

Should Behneman repeat the contention made by him at the earlier hearing that, although the plan could provide for the complete foreclosure of the stockholders' rights, it could not provide for their partial extinction where the stock surrendered was to be used by the debtor as the reward for future management, the contention may be simply answered by pointing out that the court could, in view of the fact that the debtor is insolvent, order any percentage of the stock up to 100% surrendered to the debtor, and then order the debtor to reward its management, not only by salaries, but by the issuance of the treasury stock thus acquired. What the plan and the court may direct in two moves [13] it obviously may consolidate into one.

Conclusion

As Prof. John Gerdes points out in his article on Section 77B (12 *New York University Law Quar-*

terly, September, 1934 1) the proposed plan is prima facie fair upon its face, particularly so in that it has been accepted by two-thirds of the creditors and a majority of the stockholders. The proposed plan, insofar as it relates to stockholders, is squarely within the contemplation and broad provisions of Section 77B and, moreover, in view of the insolvency of the debtor, is extremely liberal to the stockholders in that it requires them to give up only 50% of their holdings, instead of 100%. It is therefore submitted that Behneman's contention is without merit, and that the proposed plan of reorganization of the debtor is fair, feasible, and proper.

STANLEY PEDDER

KENNETH FERGUSON

Attorneys for W. R. Bassick, trustee.

[Endorsed]: Filed with Spl Master Jan. 10, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [14]

[Title of District Court and Cause—No. 25937-S.]

BRIEF OF PETITIONING CREDITORS IN
SUPPORT OF THE PROPOSED PLAN OF
REORGANIZATION AND IN REPLY TO
THE BRIEF OF HAROLD M. F. BEHNE-
MAN

The objecting stockholder, Harold M. F. Behneman, objects to the approval of paragraph G, sub-

division 2, of the proposed plan of reorganization on the following two grounds:

1. That the rights of stockholders are not altered or [15] modified within the meaning of subdivision (b). (2) of section 77B of the Bankruptcy Act;

2. That paragraph G, subdivision 2, of the plan of reorganization is not fair and equitable.

Subdivision 2 of paragraph G of the plan of reorganization provides as follows:

“The remaining 50% of the shares so delivered by each stockholder shall be held by said Board free and clear of any claim, right, title, or interest therein by such stockholder, to be distributed by said Board, in its sole discretion, either in whole or in part, to the managing officers thereof, as a reward for management and the successful rehabilitation of the company’s affairs.”

The relevant provision of section 77B of the Bankruptcy Act states:

“(b) A plan of reorganization within the meaning of this section * * * (2) may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise ;* * *.”

I.

Subdivision 2 of paragraph G of the plan of reorganization is a modification or alteration of the rights of stockholders within the meaning of the statute.

The contention of counsel for the objecting stockholder that the above quoted provision of the plan of reorganization does not modify or alter the rights of stockholders within the meaning of subdivision (b) (2) of section 77B of the Bankruptcy Act (Tr. pp. 37-39) is made despite the fact that Leo D. Byrne, Esq., of counsel for the objecting stockholder, made the following concessions at the hearing of this matter before Judge W. A. Beasley, as special master, on October 22, 1935: (1) that the plan of [16] reorganization might take away the stock of the stockholders absolutely, and (2) that the debtor corporation is insolvent (Tr. pp. 38, 39). It appears to us too obvious for argument that if the rights of stockholders may be entirely destroyed, as has been held in a number of decisions,¹ the rights may be changed to a limited degree.

1. In re Central Funding Corporation (2nd Cir., C. C. A., February 11, 1935), 75 F. (2d) 256;

In re William Penn Garage (D. C., W. D. Pa. Oct. 7, 1935), C. C. H. Bankruptcy Law Service, p. 1682, par. 3649;

In re Continental Cigar Co. (D. C., N. D. Pa. Oct. 30, 1935), C. C. H. Bankruptcy Law Service, p. 1684, par. 3652;

See also: Bankruptcy Act, sec. 77B, subd. (e) (1): "A plan of reorganization shall not be confirmed until it has been accepted in writing, * * * And provided further, That such acceptance shall not be requisite to the confirmation of the plan by any stockholder or class of stockholders (1) if the judge shall have determined either that the debtor is insolvent, or that the interests of such stockholder or stockholders will not be affected by the plan, * * *."

Under paragraph G of the plan of reorganization, the rights of the stockholders in 50 per cent of the shares of stock are abolished. In our opinion this is tantamount to an alteration or modification of the rights of those stockholders. A case which presents a somewhat analogous situation is the comparatively recent case of *Application of Silberkraus*, 250 N. Y. 242, 165 N. E. 279, decided by the Court of Appeals of New York on February 13, 1929. In that case the appellants were the holders of a small minority of shares of the second preferred stock of Schaffer Stores Company, Inc. They claimed that the preferential right of such shares had been altered by the amended certificate of incorporation which on March 31, 1926, over their objection, was authorized by a majority of more than two-thirds. They applied for an appraisal of the [17] value of their shares and payment therefor by the corporation under a certain section of the Stock Corporation Law of New York. Holders of the second preferred stock provided for in the original certificate were required by amended certificate to exchange their stock for new convertible stock limited to the payment of 7 per cent dividends and callable at 110, whereas the old stock paid dividends of 10 per cent and might acquire a market value far in excess of sale, and were entitled to share on distribution of assets only to half of the amount of the new shares. The question presented was whether the preferential rights of the outstanding shares of the old second preferred had been altered by the amended certificate of incorporation, within the pro-

vision of the statute which gave stockholders not voting in favor of such alteration the right to have his shares appraised "If the certificate alters the preferential rights of any outstanding shares, * * *" (sec. 38, subd. 12, N. Y. Stock Corporation Law). Upholding the right of the appellants to have their shares of stock appraised under the statute, the majority of the court said (p. 280):

"Neither the preferential right of the old stock nor even the old stock itself persists. Both disappear. The stock is retired, and, with its retirement, its preferential right falls. A right to participation at par in the distribution of assets is attached to the new stock, but the fact that that right is similar to the old ones belonging to the two classes of stock which have been abolished does not prevent an alteration of the abolished right. *Abolition is alteration*" (italics ours).

We believe the objection made by counsel for the objecting stockholder that the rights of stockholders were not modified or altered within the meaning of section 77B by the above quoted paragraph G of the plan of reorganization in the final analysis merely presents a question of the fairness of the plan. As heretofore [18] stated, it has been held in the decisions referred to above, and in other decisions,² that the rights of stockholders may be en-

2. See also: *In re Consolidation Coal Co.* (D. C. Md. July 10, 1935), 11 F. Supp. 594, C. C. H. Bankruptcy Law Service, p. 1565, par. 3538.

tirely destroyed if the corporation is insolvent, providing the plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders. Long before the adoption of section 77B of the Bankruptcy Act, it was the rule that the stockholders' interest in the property of the corporation is subordinate to the rights of unsecured creditors, and in the event of the reorganization of the insolvent corporation, the unsecured creditors are entitled to the benefit of the values which remain after the lien holders are satisfied before stockholders may have any interest in the reorganized corporation.³ The proposed plan of reorganization for the debtor corporation provides for the modification of the rights of creditors by scaling down the indebtedness due to the creditors, decreasing interest rates and extending maturity dates. As declared by the Supreme Court of the United States, the priority of creditors over stockholders must be preserved.⁴ It would thus be unfair and inequitable to the creditors if the plan of reorganization made no provision for the alteration or modification of the rights of the stockholders. This would be true under section 77B of the Bankruptcy Act where the plan of reorganization has been ac-

3. *Kansas City Ry. v. Cent. Union Tr. Co.*, 271 U. S. 445; 48 Harv. L. Rev. 39, 74, et seq.

4. See: *Kansas City Ry. v. Cent. Union Tr. Co.*, cited supra; *Northern Pacific Ry. Co. v. Boyd*, 228 U. S. 482; *Louisville Trust Co. v. Louisville Ry. Co.*, 174 U. S. 674.

cepted by the necessary proportion of [19] creditors and stockholders, which is the fact here, even though the debtor corporation be not admittedly insolvent.

II.

The proposed plan of reorganization is both fair and equitable within the meaning of section 77B of the Bankruptcy Act.

We believe a complete answer to the contention of counsel for the objecting stockholder that subdivision 2 of paragraph G of the plan of reorganization is not fair and equitable, is the statute itself.⁵ The debtor corporation being admittedly insolvent, the plan of reorganization need not provide for the stockholders.⁶

This court should not be interested in the facts which counsel for the objecting stockholder term "peculiar" in respect to the consent of Charles C. Gardner, as executor, on behalf of the estate of Mary F. McGurn. The facts were most explicitly testified to by Charles C. Gardner at the hearing before Judge Burton J. Wyman, special master, on December 30, 1935. Charles C. Gardner testified that he approved of the plan of reorganization as the only feasible means or chance of salvaging some-

5. See Bankruptcy Act, sec. 77B, subd. (e) (1), quoted in note 1, *supra*, and see also sec. 77B, subd. (f) (1): " * * * the judge shall confirm the plan if satisfied that (1) it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible; * * *."

6. See notes 1 and 2, *supra*.

thing from the assets of the corporation for the stockholders and that he willingly consented to the plan on behalf of the estate of Mary F. McGurn, and further, that he obtained an order of the probate court authorizing his consent as such executor. In view of the cases decided by the [20] Supreme Court of the United States,⁷ the interrogatories of counsel for the objecting stockholder,

“Why should this supposed extra reward be taken out of the pockets of the stockholders? Why not take some of this supposed reward from the security held by the Bank of California?”⁸

obviously need no answering argument. A reference to the decisions referred to in notes 3 and 4, *supra*, of this brief will disclose to counsel for the objecting stockholder that even the rights of unsecured creditors must be protected before the rights of stockholders. A reading of subdivision (f) (1) of section 77B of the Bankruptcy Act, quoted in note 5, *supra*, illustrates the fact that creditors and stockholders are considered as separate *classes*. Under the decisions of the Supreme Court of the United States, the classes of creditors must be considered before the classes of stockholders, and that is exactly what is done in the plan of reorganization. The conclusive fact is that the corporation is admitted insolvent and the stockholders no longer

7. See notes 3 and 4, *supra*.

8. Brief of Harold M. F. Behneman, p. 5.

have any equity in the assets of the corporation. How, then, can it be said, as does counsel for the objecting stockholder, that the reward which it has anticipated may be paid to the managing directors from the 50 per cent of the shares of stock surrendered to the board of directors, in accordance with subdivision 2 of paragraph G of the proposed plan of reorganization, is "taken out of the pockets of the stockholders"? Counsel for the objecting stockholder have admitted that the stock may be taken away absolutely. That is in effect what is done with respect to the 50 per cent of the shares of the stock by subdivision [21] 2 of paragraph G of the plan of reorganization. The fact that the plan goes a step farther and makes provision for the redistribution of that stock in the future should be of no concern to the stockholders. Certainly, if the plan had provided for the surrender of the 50 per cent of the shares of the stock to the treasury of the corporation, and then later the board of directors reissued those shares of stock for the purposes set forth in subdivision 2 of paragraph G of the plan of reorganization, there could be no valid objection from the stockholders. Therefore, the provision for the redistribution of the 50 per cent of the shares of stock before the surrender of the stock by the stockholders is, we submit, no valid or any reason for vitiating subdivision 2 of paragraph G of the plan.

Counsel for the objecting stockholder make the statement, "* * * we submit that they should be

rewarded from the assets of the company.’”⁹ That is exactly what will be accomplished by the reward of part of the shares of stock if the corporation is so rehabilitated that the stock will become of some value, for then the stock will represent a certain interest in the assets of the corporation. That the proponents of the plan have made provision for return of 50 per cent of the stock to the stockholders “Upon the expiration of 5 years and the payment in full of the extended obligations, * * *”¹⁰ is evidence of the fact that the plan is fair and equitable from the viewpoint of the stockholders as well as the creditors. [22]

Conclusion

From the foregoing we conclude the following:

1. The language of subdivision (b), paragraph (2), of section 77B of the Bankruptcy Act, is clear and unambiguous in providing that the plan of reorganization may include provisions modifying or altering the rights of stockholders, and the abolition of rights of stockholders is a modification or alteration within the meaning of the statute.
2. Where the corporation is insolvent, the rights of stockholders may be entirely disregarded and no provision made for them in the reorganization of the corporation.
3. If the judge determines either that the debtor

9. Brief of Harold M. F. Behneman, p. 5.

10. Paragraph G, subdivision 1, of the proposed plan of reorganization.

is insolvent or that the interests of a stockholder or stockholders will not be affected by the plan of reorganization, the plan need not be accepted in writing in compliance with section 77B of the Bankruptcy Act and may be confirmed by the court although no provision is made for the stockholders.

4. If the plan of reorganization has been accepted by the necessary proportion of creditors and stockholders, as provided by section 77B of the Bankruptcy Act, the plan should be confirmed by the court over the objection of a minority stockholder if it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

It is respectfully submitted that the objection of the minority stockholder to the plan of reorganization presented to this court is unsupported in fact and law, that the proposed plan of reorganization of the debtor corporation is fair and equitable [23] within the meaning of section 77B of the Bankruptcy Act, and should be confirmed by this court.

Dated: January 11, 1936.

PILLSBURY, MADISON &
SUTRO

MARSHALL P. MADISON
GERALD S. LEVIN

Attorneys for Petitioning Creditors

Admission of Service

[Endorsed]: Filed with Special Master Jan. 11, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [24]

[Title of District Court and Cause.—No. 25937-S.]

REPLY OF HAROLD M. F. BEHNEMAN TO
BRIEF OF PETITIONING CREDITORS
ON PLAN OF REORGANIZATION

Petitioning creditors state that Leo D. Byrne, Esq., of counsel for the objecting stockholder, conceded before Judge W. A. Beasly, as Special Master, on October 22, 1935, that the plan of reorganization might take away the stock of the stockholders absolutely and that it appears too obvious for argument that if the rights of stockholders may be entirely destroyed, the rights may be changed to a limited degree. We respectfully submit that Mr. Byrne made no such concession. He stated that in his opinion stockholders might be compelled to surrender fifty per cent of their stock to the treasury but that is quite a different thing than in any way admitting that fifty per cent might be taken away from one stockholder and given to some newcomer.

[25]

The decisions which petitioning creditors cite, especially the case of Silberkraus, 250 N. Y. 242, illustrates exactly the soundness of our contention. Those cases held, as we are contending, that the rights of stockholders are altered by taking away preferential rights or modifying the shares in some way. Again we say that is quite a different thing than taking away the stock from A and giving it to B.

The point made by petitioning creditors that 77b provides:

“The Judge shall confirm the plan if satisfied that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible.”

This in no way alters the fact that the only plan which the court can approve is one which is set forth in 77b, and the fact that the corporation is insolvent has nothing whatever to do with the question. The stock may have some value and the very purpose of the act for corporate reorganization is an act for the benefit of the debtor. If it were merely an act for the benefit of creditors ordinary bankruptcy should have been pursued. That section of the Act, Subdivision (e) (1), provides that the only significance of the insolvency of the debtor is that the acceptance shall not be requisite to a confirmation of the plan. That question has no bearing upon the proposition that the only plan of reorganization which the court can confirm is the plan set forth in the act and this, so far as the stockholders are concerned, “may include provisions modifying or altering the rights of stockholders generally, or of any class of them, either through the issuance of new securities of any character or otherwise.”

We therefore submit that the rights of stockholders are not altered or modified by compelling one stockholder to give his [26] stock to some newcomer. The rights of stockholders are only altered

or modified by the altering or modifying of the security itself.

Dated: January 13th, 1936.

Respectfully submitted,

BYRNE, LAMSON & JORDAN

Attorneys for Objecting Stockholder, Harold M. F.
Behneman

Receipt of a copy of the within Reply of Harold M. F. Behneman to Brief of Petitioning Creditors on Plan of Reorganization is hereby acknowledged this day of January, 1936.

Attorneys for Petitioning Creditors.

[Endorsed]: Filed with Special Master Jan. 14, 1936.

[Endorsed]: Filed with Clerk Feb. 19, 1936. [27]

District Court of the United States
Northern District of California
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 10th day of March, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, D. J.

[Title of Cause.—No. 25937.]

This matter came on regularly this day for hearing of motion to stay proceedings. Paul S. Jordan, Esq., and Leo D. Byrne, Esq., appeared specially for Respondents. Harold M. F. Behneman, Esq., Gladys A. Shores, Kenneth Ferguson, Esq., and Gerald S. Levin, Esq., appearing as Attorneys for Petitioner, Hendy Realization Company. After hearing the Attorneys, It Is Ordered that said motion to stay proceedings be and the same is hereby referred to Burton J. Wyman, Esq., as Special Master. [28]

[Title of District Court and Cause—No. 25937-S.]

ORDER AMENDING ORDER OF MARCH 3,
1941, AND EXTENDING TIME FOR FIL-
ING OF SPECIAL MASTER'S REPORT
AND HEARING THEREON.

Good cause appearing therefor;

It is hereby ordered, adjudged, and decreed that the prior [29] Order of this court dated March 3, 1941, fixing time for hearing of petition, appointing Special Master, and referring petition and other matters to Special Master be and the same is hereby amended so as to provide that the Special Mas-

ter make his written report to this court as heretofore and in Paragraph 2 of said Order of March 3, 1941 provided on or before March 29, 1941; and that the time for the filing of the written report of said Special Master, as heretofore ordered, be and the same is hereby extended from March 22, 1941, to March 29, 1941;

And it is further ordered, adjudged, and decreed that the hearing upon said petition, together with said report of said Special Master, come on for hearing before this court on Monday, March 31, 1941, at the hour of ten o'clock A. M., and that the time of such hearing is hereby accordingly extended.

And it is further ordered, adjudged, and decreed that in all other respects said Order dated March 3, 1941, shall remain in full force and effect; and that a copy of this Order need be served only upon Byrne, Lamson & Jordan, attorneys for Harold M. F. Behneman and Gladys M. Shores, respondents named in said petition.

Dated: March 25, 1941.

A. F. ST. SURE

Judge of the District Court

The foregoing Order having been examined by me, it is respectfully recommended that the same be made.

Dated: March 25, 1941.

BURTON J. WYMAN

Special Master.

[Endorsed]: Filed Mar. 25, 1941. [30]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, D. J.

[Title of Cause—No. 25937. In Bankruptcy.]

This matter came on regularly this day for hearing on Special Master's certificate on petition for restraining order. It was stipulated by and between Paul S. Jordan, Esq., and Kenneth Ferguson, Esq., that all matters relating to the Petition to stay proceedings herein and the Civil Action No. 21792, Shores vs. Hendy Realization Co., are now before this Court and should be consolidated for trial. After hearing the Attorneys, It Is Ordered that said stipulation be approved and that Respondent herein have ten (10) days within which time to file an Answer to the Motion to stay proceedings. [31]

District Court of the United States
Northern District of California
Southern Division

At a stated term of the Southern Division of the United States District Court for the Northern

District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 7th day of April, in the year of our Lord one thousand nine hundred and forty-one.

Present: the Honorable A. F. St. Sure, D. J.

[Title of District Court and Cause—No. 21792-S.
Civil.]

Paul S. Jordan, Esq., appearing as attorney for plaintiff, and Kenneth Ferguson, Esq., appearing as attorney for defendant. After hearing the attorneys, it is Ordered that the motion to dismiss and the motion for more definite statement each be denied. Defendant allowed ten (10) days to answer. It was stipulated between the parties that all matters relating to the motion to stay proceedings in Bankruptcy case No. 25937, In the Matter of Joshua Hendy Iron Works, etc., Debtor, and this action are now before the Court and should be consolidated for hearing. It is Ordered that said stipulation be approved. [32]

[Title of District Court and Cause—No. 25937-S
and No. 21792-S.]

MOTION TO REQUIRE APPELLANTS TO
FILE REPORTER'S TRANSCRIPT; AND
TO DIRECT THE CLERK AS TO THE
CERTIFICATION AND TRANSMITTAL
OF A PROPER RECORD ON APPEAL.

Notice of Motion and Memorandum of Points and
Authorities. [33]

To Honorable A. F. St. Sure, District Judge:

Appellees (Debtor, Petitioners, and Defendants,
above named) hereby move the above entitled Court
as follows:

1. That this Court make its order requiring appellants to furnish and file two copies of the reporter's transcript made and taken at the trial of the above entitled consolidated proceedings, containing all of the evidence and proceedings had at said trial; as designated in paragraph 11 of Appellees' Designation of Additional Contents of Record on Appeal, on file herein.

2. That this Court make its order prohibiting the Clerk of this Court from certifying or transmitting to the appellate court a record on appeal containing only those portions of the record or proceedings designated for inclusion by appellants and omitting all or any part of the additional portions of the record, proceedings, and evidence designated by appellees.

3. That this Court make its order directing the

Clerk of this Court to prepare, certify, and transmit to the appellate court a true copy of the matter designated by the parties herein, including the additional portions of the record, proceedings, and evidence designated by appellees in Appellees' Designation of Additional Contents of Record on Appeal, on file herein, upon appellants making such arrangements for payment or security for payment of the costs of such preparation, certification, and transmittal, as may be satisfactory to the Clerk of this Court.

This motion will be made upon the ground that the filing of copies of the reporter's transcript and the certification and transmittal of the additional portions of the record, proceedings, and evidence designated by appellees are required by law; and that, unless so ordered, the appellants will not file said copies of the reporter's transcript, and the Clerk will prepare, [34] certify, and transmit a partial, incomplete, and improper record on appeal to the appellate court.

This motion will be based upon this motion, the notice of motion, affidavit and memorandum of points and authorities attached hereto, and all of the records, files, and proceedings on file and had in the above entitled consolidated proceedings.

Dated: January 13th, 1942.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT [35]

NOTICE OF MOTION.

To Gladys M. Shores and Harold M. F. Behneman,
Appellants, and to Messrs. Byrne, Lamson &
Jordan, and Paul S. Jordan, Esq., their at-
torneys:

Please take notice, that the undersigned will bring the foregoing Motion on for hearing before the above entitled Court at its Courtroom on the third floor of the Post Office Building at 7th and Mission Street, San Francisco, California, on Monday, the 19th day of January, 1942, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard.

Dated: January 13th, 1942.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT [36]

MEMORANDUM OF POINTS AND
AUTHORITIES.

In support of the foregoing Motion, the undersigned refer to the following points and authorities:

1. Appellants are required to furnish and file two copies of the reporter's transcript of the trial;

and if they fail to do so the Court on motion may require them to do so.

Rules of Civil Procedure, Rule 75 (b).

2. The Clerk is required to transmit to the appellate court a true copy of the matter designated by appellees as well as by appellants; appellants may not refuse to pay the cost of preparation and certification of matter designated by appellees, and thereby procure a record on appeal consisting only of the matter designated by appellants.

Rules of Civil Procedure, Rule 73, 76;

O'Brien, Manual of Federal Appellate Procedure (3d ed.) pages 48, 50, 51-2, 81;

Amerlux Steel Corp. v. Johnson Line (CCA 9), 33 F2 70, 71;

28 USCA sec. 832.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

[Endorsed]: Filed Jan. 13, 1942. [37]

[Title of District Court and Cause—No. 25937-S
and No. 21792-S.]

AFFIDAVIT IN SUPPORT OF MOTION TO
REQUIRE APPELLANTS TO FILE RE-
PORTER'S TRANSCRIPT; AND TO DI-
RECT THE CLERK AS TO THE CERTI-
FICATION AND TRANSMITTAL OF A
PROPER RECORD ON APPEAL. [38]

State of California,
City and County of San Francisco—ss.

Bert W. Levit, being duly sworn, deposes and
says:

That he is an attorney at law duly licensed to
practice in all of the courts of the State of Cali-
fornia and a member of the bar of the above en-
titled Court; that he is a member of the law firm
of Long & Levit, one of the attorneys of record for
appellees herein; that he makes this affidavit on
behalf of appellees for the reason that the facts
herein stated are within his personal knowledge
and are better known to him than to the appellees.

That after the filing of Appellees' Designation of
Additional Contents of Record on Appeal herein,
and on January 8, 1942, affiant received by mail
copy of a letter dated January 7, 1942, written by
appellants' attorneys of record to the Clerk of
this Court; that affiant is informed and believes
and therefore alleges that the original of said letter
was received by said Clerk on January 8, 1942;

that a copy of said letter is attached hereto, marked Exhibit "A" and made a part hereof;

That upon receiving said letter, affiant telephoned said Clerk and advised him that appellees wholly disagree with the procedure outlined therein and controverted the right of appellants to take or maintain the position therein adopted; said Clerk then suggested that affiant write him a letter stating appellees' position, and stated that upon receiving the same he (said Clerk) would further communicate with appellants' attorneys;

That thereupon, and on January 8, 1942, affiant addressed a letter to said Clerk in words and figures as set forth in Exhibit "B" attached hereto and made a part hereof; that on said day a copy of said letter was mailed to appellants' attorneys; [39]

That affiant heard nothing further until January 12, 1942, and on said day affiant received by mail copy of a letter dated January 10, 1942, written by appellants' attorneys of record to said Clerk; that affiant is informed and believes and therefore alleges that the original of said letter was received by said Clerk on January 12, 1942; that a copy of said letter is attached hereto, marked Exhibit "C" and made a part hereof;

That upon receiving said letter, affiant telephoned said Clerk and inquired of him whether said letter correctly recited the procedure which said Clerk intended to follow, unless otherwise instructed by the Court; that said Clerk replied in the affirmative;

That affiant is informed and believes and there-

fore alleges that appellants have not, as required by Rule 75 (b) of the Rules of Civil Procedure, filed herein two or any copies of any portion of the reporter's transcript made and taken at the trial of the above entitled consolidated proceedings, containing the evidence and proceedings had at said trial, and will continue to refuse and fail to do so unless required to do so by the Court.

That affiant and appellees are informed and believe that the Clerk of this Court does not intend to transmit to the appellate court a true copy of the matter designated by the parties for inclusion in the record on appeal, as required by Rule 75 (g) of the Rules of Civil Procedure; but intends, unless otherwise ordered by the Court, to permit appellants to select such portions of the matter designated by the parties for inclusion in the record on appeal, as appellants may see fit to select, and to then certify such selected portions and transmit the same to the appellate court as the record on appeal herein. [40]

Further affiant sayeth not.

BERT W. LEVIT

Subscribed and sworn to before me, this 13th day
of January, 1942.

(Seal)

KATHRYN E. STONE

Notary Public, In and for the
City and County of San Fran-
cisco, State of California. [41]

EXHIBIT "A"

Byrne, Lamson & Jordan
Attorneys at Law
1249 Russ Building
San Francisco, Calif.

Jan. 7, 1942.

Mr. Walter B. Maling
Clerk of the United States District Court
United States Post Office Building
Seventh and Mission Streets
San Francisco, California

Re: The Joshua Hendy Iron Works, Debtor;
Hendy Realization Co., et al vs. Behne-
man, et al, Your No. 25937-S;
Shores vs. Hendy Realization Co., et al,
Your No. 21792-S

Dear Sir:

You are hereby requested to proceed with preparation of the transcript of the record on appeal in the above entitled consolidated proceedings now pending in the United States District Court for the Northern District of California, incorporating therein only those items heretofore designated by appellants Behneman and Shores in their "Designation of Contents of Record on Appeal" filed in your office on December 23, 1941. When preparation of said transcript has been completed, kindly affix your certificate as to the correctness thereof and then file the same with the Circuit Court of Appeals for the Ninth Circuit, to which the appeal has been taken. According to our records, the rec-

ord on appeal should be filed with the said Circuit Court not later than January 24, 1942.

With reference to "Appellees' Designation of Additional Contents of Record on Appeal", served and filed by appellees on January 2, 1942, we request that you include a copy thereof in the record on appeal; otherwise it is not our wish that you include in the record on appeal any of the items specified by appellees therein except insofar as they may be duplications of items designated by appellants. Appellants do not consider the portions of the record designated by appellees to be in any way pertinent or necessary to this appeal, and are therefore not willing to assume the cost of their inclusion in the appeal record.

If preparation of the record on appeal as designated by appellants cannot be completed for filing in the Circuit Court prior to January 24, 1942, kindly advise us amply in advance of that date so that we may arrange for an enlargement of the time for filing.

A copy of this letter is being sent to counsel for appellees in order that they may be fully advised in the premises.

Thanking you for your cooperation in this matter, we are

Very truly yours,

BYRNE, LAMSON & JORDAN
By PAUL S. JORDAN

Attorneys for Appellants Behne-
man and Shores [42]

EXHIBIT "B"

Long & Levit
Merchants Exchange
San Francisco

Walter B. Maling, Esq.,
Clerk, United States District Court,
Post Office Building,
San Francisco, California.

Re: File #1240—Joshua Hendy Iron Works,
etc.; Actions No. 21792-S and No.
25937-S.

Dear Sir:

This will confirm our telephone conversation of this morning relative to letter dated January 7th addressed to you by Messrs. Byrne, Lamson & Jordan and carboned to us.

It is our opinion that Rule 75 of the Rules of Civil Procedure is entirely clear as to the right of an appellee to designate additional portions of the record and proceedings, not included in the designation filed by the appellant; and as to the obligation of the appellant to pay the cost thereof.

It is not within the province of an appellant to determine that he will proceed with the appeal upon a record made up as designated by him and omitting the designation of appellee. It would seem that the aforesaid letter is wholly irregular, and should be disregarded by you.

Paragraph (g) of Rule 75 provides in part:

“The clerk of the district court . . . *shall* transmit to the appellate court a true copy of the matter *designated by the parties* . . .”*

It seems clear that, under this Rule, you are not empowered to transmit to the appellate court the matter designated by appellant alone. It may be, that if appellant refuses to pay the necessary costs of the record “designated by the parties”, you would not be obliged to prepare or transmit any record whatever. But we do not believe that it would be proper for you to transmit a partial record where both parties have filed designations, as here.

We respectfully submit these comments for your consideration. Unless we hear from you to the contrary, we shall assume that you agree with our position. We are sending a copy of this letter to Messrs. Byrne, Lamson & Jordan.

Yours very truly,

LONG & LEVIT [43]

*Underscored in original copy.

EXHIBIT "C"

Byrne, Lamson & Jordan
Attorneys at Law
1249 Russ Building
San Francisco, Calif.

Jan. 10, 1942

Walter B. Maling, Esq.
Clerk of the United States District Court
United States Post Office Building
Seventh and Mission Streets,
San Francisco, California

Re: The Joshua Hendy Iron Works, etc.
Your Actions No. 25937-S and 21792-S

Dear Sir:

This will confirm our conversation of yesterday regarding preparation of the record on appeal in the above entitled consolidated proceedings. Appellants Shores and Behneman, for the reasons already stated to you in our letter of January 7, 1942, will not pay for the cost of including in the record on appeal those portions of the record designated by appellees. It is our understanding that you will accordingly prepare, certify and file in the Circuit Court only those portions of the record heretofore designated by appellants (but including "Appellees' Designation of Additional Contents of Record on Appeal" filed on January 2, 1942), and that this will be done prior to January 24, 1942. If for any reason you require additional time, please advise

us sufficiently in advance of the last mentioned date to enable us to apply for a time extension.

A copy of this letter is being sent to counsel for appellees.

Thanking you for your cooperation in this matter, we are

Very truly yours,

BYRNE, LAMSON & JORDAN
By PAUL S. JORDAN

[Endorsed]: Filed Jan. 13, 1942. [44]

[Title of District Court and Cause.]

APPELLEES' DESIGNATION OF ADDITIONAL CONTENTS TO BE SUPPLEMENTALLY CERTIFIED AS A PART OF THE RECORD ON APPEAL

Pursuant to the order duly given or made by the United States Circuit Court of Appeals for the Ninth Circuit on May 18, 1942, appellees hereby designate that the following additional portions of the record, proceedings and evidence in the District Court be included in the record on appeal and be, by the Clerk of the District Court, supplementally certified up as a part of and in addition to the matters already certified as the record on appeal in the above entitled consolidated causes:

- (1) The following additional items accompanying the "Certificate and Report of Special Master Relative to the Confirmation of Plan

of Reorganization and Directing Reorganization of Debtor Corporation," dated February 19, 1936, on file in District Court Action No. 25937-S, and designated in said Certificate and Report as "Papers Handed Up Herewith":

- (a) Brief of Harold M. F. Behneman on Objections to Plan of Reorganization, being No. 2 in said Certificate;
- (b) Memorandum of Points and Authorities of W. R. Bassick, Trustee, as Amicus Curiae, on Further Hearing Upon Proposed Plan of Reorganization, being No. 3 in said Certificate;
- (c) Brief of Petitioning Creditors in Support of the Proposed Plan of Reorganization and in Reply to the Brief of Harold M. F. Behneman, being No. 4 in said Certificate; and
- (d) Reply of Harold M. F. Behneman to Brief of Petitioning Creditors on Plan of Reorganization, being No. 5 in said Certificate;

(2) Minute Order in District Court Action No. 25937-S dated March 10, 1941, referring "Motion to Stay Proceedings" to the Honorable Burton J. Wyman, as Special Master;

(3) Order in District Court Action No. 25937-S dated March 25, 1941, "Amending Order of March 3, 1941, and Extending [45] Time for Filing of Special Master's Report and Hearing Thereon";

(4) Minute Order dated April 7, 1941, in District Court Action No. 25937-S, and identical Minute Order dated April 7, 1941, in District Court Action No. 21792-S, relating to, setting forth, and approving the stipulation of counsel that said District Court Actions should be forthwith consolidated;

(5) Motion in consolidated District Court Actions No. 25937-S and No. 21792-S to "Require Appellants to File Reporter's Transcript; and to Direct the Clerk as to the Certification and Transmittal of a Proper Record on Appeal," together with the Notice of Hearing said Motion, and the Affidavit and Memorandum of Points and Authorities in support thereof.

Dated: San Francisco, California, May 27, 1942.

STANLEY PEDDER AND
KENNETH FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

Attorneys for Appellees

(Receipt of service)

[Endorsed]: Filed May 28, 1942. [46]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 46 pages, numbered from 1 to 46, inclusive, contain a full, true, and correct transcript of the records and proceedings in the cases of The Joshua Hendy Iron Works, etc., Debtor, Hendy Realization Co. etc., et al, Petitioners, vs. Harold M. F. Behneman, et al, Respondents. No. 25937-S. and Gladys M. Shores, Plaintiff, vs. Hendy Realization Co. etc., et al, Defendants. No. 21792-S. Nos. 25937-S, 21792-S. as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of five dollars & forty-five cents (\$5.45) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 28th day of May A. D. 1942.

WALTER B. MALING

Clerk

(Seal)

WM. J. CROSBY

Deputy Clerk [47]

[Endorsed]: No. 10085. United States Circuit Court of Appeals for the Ninth Circuit. Gladys M. Shores and Harold M. F. Behneman, Appellants, vs. Hendy Realization Co., a corporation, (formerly The Joshua Hendy Iron Works), A. J. Mayman, C. B. Moores, E. Price, A. E. Webber and W. R. Bassick, individually and as the Directors of Hendy Realization Co., Elmer M. Hyland and Morris Levit, Appellees. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed May 29, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10,085

In the Matter of THE JOSHUA HENDY IRON
WORKS (whose name has been changed to
Hendy Realization Co.), a corporation,
Debtor.

HENDY REALIZATION CO. (formerly The
Joshua Hendy Iron Works), a corporation,
A. J. MAYMAN, C. B. MOORES, E. H.
PRICE, W. R. BASSICK, E. M. HYLAND
and MORRIS LEVIT,
Petitioners,

vs.

HAROLD M. F. BEHNEMAN and GLADYS M.
SHORES,
Respondents.

GLADYS M. SHORES,
Plaintiff,

vs.

HENDY REALIZATION CO., a corporation (for-
merly The Joshua Hendy Iron Works), A. J.
MAYMAN, C. B. MOORES, E. PRICE, A. E.
WEBBER and W. R. BASSICK, individually
and as the Directors of Hendy Realization Co.,
ELMER M. HYLAND, MORRIS LEVIT,
FIRST DOE, SECOND DOE and THIRD
DOE,
Defendants.

APPELLANTS' STATEMENT OF POINTS ON
WHICH THEY INTEND TO RELY ON
THIS APPEAL, AND DESIGNATION OF
PARTS OF THE RECORD TO BE
PRINTED, WHICH APPELLANTS THINK
ARE NECESSARY FOR THE CONSID-
ERATION THEREOF

Appellants' Statement of Points

Appellants Gladys M. Shores and Harold M. F. Behneman herewith state the points on which they intend to rely on this appeal as follows:

1. That the United States District Court for the Northern District of California, Southern Division, was, and is, without jurisdiction over the entire subject matter and issues involved in the above entitled consolidated causes, and that said court accordingly erred in the making and entering of said judgment herein on November 15, 1941;

2. That the motion of appellant Gladys M. Shores to remand to the Superior Court of the State of California, in and for the City and County of San Francisco, the above cause entitled "Gladys M. Shores, plaintiff vs. Hendy Realization Co., a corporation, et al, defendants", and numbered 21792-S in said United States District Court, should have been granted for the reason that said suit is not one arising under the Constitution or laws of the United States and, accordingly, does not involve a "Federal question" (that said suit was one arising under the Constitution or laws of the United States constituted the sole ground urged by ap-

pellees for removal thereof from said Superior Court to said United States District Court); and for the further reason that said suit is not one within the original and exclusive jurisdiction of said United States District Court, and that jurisdiction thereof had already attached in said Superior Court prior to its removal to said United States District Court upon the petition of appellees. For said reasons, the motion of appellant Gladys M. Shores to remand said suit to said Superior Court should accordingly have been granted, and the said United States District Court erred in denying the same and in making and entering said judgment filed herein on November 15, 1941;

3. That the motion of appellants Gladys M. Shores and Harold M. F. Behneman to dismiss appellees' petitions filed in said United States District Court on February 19, 1941 (see clerk's transcript Volume I, page 54), and on March 11, 1941 (see clerk's transcript Volume I, page 85), in the above cause entitled "In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor; Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al, Petitioners vs. Harold M. F. Behneman and Gladys M. Shores, Respondents", and numbered 25937-S in said United States District Court, and to vacate the restraining order of said United States District Court given and made on March 11, 1941 (see clerk's transcript Volume 1, page 90), should have been granted for the reason that said United States District Court

lacks jurisdiction over the issues and subject matter referred to and described in said above mentioned petitions, or to grant the relief prayed for in said petitions, or either of them. Said United States District Court accordingly erred in denying appellants' said motion to dismiss said petitions in its said judgment given, made and entered on November 15, 1941;

4. That the individual appellees are not proper parties to the above cause entitled "In the Matter of The Joshua Hendy Iron Works (whose name has been changed to Hendy Realization Co.), a corporation, Debtor; Hendy Realization Co. (formerly The Joshua Hendy Iron Works), a corporation, et al, Petitioners vs. Harold M. F. Behneman and Gladys M. Shores, Respondents", and numbered 25937-S in said United States District Court, for the reason that none of them have intervened in said cause in accordance with Rule 24 of the Rules of Civil Procedure for the District Courts of the United States.

Appellants' Designation of Parts
of the Record to be Printed

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Dated: March 24th, 1942.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN

Attorneys for appellants Gladys
M. Shores and Harold M. F.
Behneman

1249 Russ Building
San Francisco, California

Receipt of a copy of the foregoing statement of points and designation of parts is acknowledged this 24th day of March.

PEDDER & FERGUSON
PILLSBURY, MADISON &
SUTRO
LONG & LEVIT

Attorneys for appellees

[Endorsed]: Filed Mar. 24, 1942. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION AND ORDER THAT CERTAIN
EXHIBITS NEED NOT BE PRINTED.

It Is Hereby Stipulated by and between appellants and appellees that all exhibits admitted in evidence during the trial of the above entitled consolidated causes in the District Court and transmitted to and filed with the Clerk of this Circuit Court of Appeals in original form, need not be printed as a part of the record herein but may be considered by this Court in their original form, for the reason that said exhibits are quite voluminous and the printing thereof would be impractical.

Dated: San Francisco, California, April 2nd,
1942.

BYRNE, LAMSON & JORDAN
PAUL S. JORDAN
By PAUL S. JORDAN
Attorneys for Appellants.

MARSHALL P. MADISON,
GERALD S. LEVIN,
STANLEY PEDDER,
KENNETH FERGUSON,
BERT W. LEVIT,
WILLIAM H. LEVIT,
By BERT W. LEVIT,
Attorneys for Appellees.

So Ordered:

FRANCES A. GARRECHT,
United States Circuit Judge.

[Endorsed]: Filed Apr. 2, 1942, Paul P. O'Brien,
Clerk.

[Title of Circuit Court of Appeals and Cause.]
APPELLANTS' SUPPLEMENTAL STATE-
MENT OF POINTS ON WHICH THEY
INTEND TO RELY ON THIS APPEAL.

Appellants Gladys M. Shores and Harold M. F. Behneman, pursuant to leave heretofore granted by this court, herewith state the following further points on which they intend to rely on this appeal, in addition to the points already set forth in their original statement on file herein.

In deciding these consolidated causes on their merits, as set forth in the final judgment entered on November 15, 1941, the United States District Court for the Northern District of California, Southern Division, erred in the following particulars, namely:

1. In finding and holding that on and prior to both November 15, 1940 and December 20, 1940 the affairs of appellee Hendy Realization Co. had been successfully rehabilitated within the meaning of that term as used in Paragraph 6G 2 of the Hendy Plan of Reorganization;

2. In finding and holding that appellees Bassick, Hyland and Levit, as managing officers of appellee Hendy Realization Co., were entitled to the 2212 $\frac{1}{2}$ shares of capital stock of appellee Hendy Realization Co. distributed to them on December 20, 1940 by appellees Mayman, Moores, Price and Bassick, and by A. E. Webber (now deceased), as the then Directors of appellee Hendy Realization Co.;

3. In finding and holding that appellees Bassick, Hyland and Levit, as managing officers of appellee Hendy Realization Co., had been inadequately compensated for the services rendered by them to said appellee corporation between March 24, 1936 and November 15, 1940, and in finding and holding that the payment of additional compensation or bonuses by said appellee corporation to appellees Bassick, Hyland and Levit on December 4, 1940 was proper. With reference to this point, appellants contend that the propriety or impropriety of any such additional compensation or bonus payments made to

said last named appellees is not an issue in either of these consolidated causes;

4. In holding that said appellants be permanently restrained and enjoined from interfering with or attacking, through court proceedings or otherwise, the additional compensation or bonus payments made by appellee Hendy Realization Co. to appellees Bassick, Hyland and Levit on December 4, 1940. With reference to this point, appellants contend that the propriety or impropriety of any such additional compensation or bonus payments made to said last named appellees is not an issue in either of these consolidated causes and, accordingly, that any reference to the same in the final judgment entered herein was improper.

Dated: April 23, 1942.

BYRNE, LAMSON & JORDAN,
PAUL A. JORDAN,

Attorneys for appellants Gladys
M. Shores and Harold M. F.
Behneman.

Receipt of a copy of the foregoing supplemental statement is acknowledged this 23rd day of April, 1942.

MARSHALL P. MADISON,
GERALD S. LEVIN,
STANLEY PEDDER,
KENNETH FERGUSON,
BERT W. LEVIT,
WILLIAM H. LEVIT,

By BERT W. LEVIT,
Attorneys for appellees.

[Endorsed]: Filed Apr. 29, 1942, Paul P.
O'Brien, Clerk.

At a stated Term, to wit: The October Term 1941, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City and County of San Francisco, in the State of California, on Monday, the eighteenth day of May in the year of our Lord one thousand nine hundred and forty-two.

Present:

Honorable Francis A. Garrecht, Circuit Judge,
Presiding,

Honorable Clifton Mathews, Circuit Judge,
Honorable Bert Emory Haney, Circuit Judge.

No. 10085

GLADYS M. SHORES, et al.,

Appellant,

vs

HENDY REALIZATION CO., a corporation, et al.,
Appellees.

ORDER GRANTING MOTION FOR ENLARGEMENT OF RECORD.

Ordered motion of appellees, filed May 8, 1942, for enlargement of the transcript of record herein, and appellants' response to such motion, filed May 15, 1942, orally presented by Mr. Kenneth Ferguson, counsel for appellees, in support of the motion, and by Mr. Paul A. Jordan, counsel for appellants, in opposition thereto, and submitted to the Court for consideration and decision.

Upon consideration thereof, Further Ordered that the motion for enlargement of the transcript of record herein be, and hereby is granted, and that a certified copy of the documents listed in appellees' motion be filed as a supplemental transcript of record in this cause.

It Is Further Ordered that the cost of certification and expense of printing of such supplemental transcript of record shall be borne by the appellees initially; the taxation of such costs to abide the disposition of the cause by this Court, and the further order of this Court.